(26,275)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 326.

JOSEPH SCHLITZ BREWING COMPANY, PETITIONER,

vs.

HOUSTON ICE & BREWING COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on Friday, November 24th, A. D. 1916, at New Orleans, Louisiana, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable William I. Grubb, District Judges:

JOSEPH SCHLITZ BREWING COMPANY, Appellant,

versus

HOUSTON ICE & BREWING COMPANY et als., Appellees.

Be it remembered, that heretofore, to-wit, on the 5th day of September, A. D. 1916, a transcript of the record of the above
b styled cause, pursuant to an appeal from the District Court of the United States for the Southern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2990, as follows:

c TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2990.

JOSEPH SCHLITZ BREWING COMPANY, Appellant,

versus

HOUSTON ICE & BREWING COMPANY et als., Appellees.

Appeal from the District Court of the United States for the Southern District of Texas.

[Original record filed September 5, 1916.]

U. S. Circuit Court of Appeals. Filed Sep. 25, 1916. Frank H. Mortimer, Clerk.

1 *Caption.*

In the District Court of the United States for the Southern District of Texas, Holding Sessions at Houston.

No. 44, Equity.

JOSEPH SCHLITZ BREWING COMPANY, Complainant,

vs.

HOUSTON ICE & BREWING COMPANY et als., Defendants.

Be it remembered: That in the above entitled and numbered cause, lately pending in said Court at Houston, and in which a Final Decree Dismissing Bill was rendered at the Regular February, 1916, Term of said Court, on, to-wit: the 11th day of April, A. D. 1916. Honorable W. T. Burns, United States District Judge, for the Southern District of Texas, Presiding, the following proceedings were had and taken in said Court, to-wit:

Bill of Complaint.

Filed March 14th, 1914.

In the District Court of the United States for the Southern District of Texas.

To the Honorable Judges of Said Court in Chancery Sitting:

The Joseph Schlitz Brewing Company, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and a citizen of the State of Wisconsin, having its
2 principle office and place of business in the City of Milwaukee, County of Milwaukee, State of Wisconsin, brings this, its bill of complaint against the Houston Ice & Brewing Company, and as it is informed and believes and on such information and belief charges the fact to be, a corporation organized and existing under and by virtue of the laws of the State of Texas, a citizen of the State of Texas, and resident in the City of Houston, Harris County, State of Texas, and of the Southern District of the State of Texas, defendant, and thereupon your Orator complains and charges as follows:

I.

Your Orator, the said Joseph Schlitz Brewing Company, was in or about the year 1873 duly organized and incorporated under and by virtue of the laws of the State of Wisconsin, with principle office and place of business in the City and County of Milwaukee, State of Wisconsin, with charter power and authority to manufacture and

bottle beer and similar malt beverages, and the exploitation and sale of the same throughout the United States of America, including the State of Texas and any foreign countries, and under said name and style, immediately upon and after its incorporation began and henceforth conducted in the City of Milwaukee the manufacture and bottling of beer and other malt beverages, and has continued in the manufacture, putting up, marketing, advertising and selling said bottled beer and other malt beverages continuously to the present time; the defendant Houston Ice & Brewing Company, as your Orator is informed and believes, and upon such information and belief charges the fact to be, is a corporation organized and existing under and by virtue of the laws of the State of Texas and a resident of the City of Houston, Harris County, State of Texas, and a citizen of the State of Texas; that the said defendant under said corporate name is engaged in the manufacture, selling and dealing in and bottling
3 of beer and other malt beverages, with principle place of business in the said City of Houston, Harris County, State of Texas.

II.

Your Orator further shows that in or about the year 1849, Joseph Schlitz owned, operated and conducted a brewery in the then Village of Milwaukee, Milwaukee County, State of Wisconsin, and thereat brewed, manufactured, and put up beer and sold and distributed the same in the said Village of Milwaukee and vicinity; that in the said year of 1873 said Joseph Schlitz and August Uihlein caused your Orator to be Organized into a corporation under the name and style of the Joseph Schlitz Brewing Company, and that at said time your Orator acquired and became the sole owner and operator of the said brewery business of said Joseph Schlitz; that from and after the organization and incorporation of your Orator in the year 1873, your Orator began the manufacture, production, brewing and bottling of beer and other malt beverages of a uniform, superior quality and high grade, and thenceforth it has at all times been the invariable rule and custom of your Orator to conduct the manufacture of beer of uniform and high grade materials by superior and high grade machinery and competent, skilled workmen, and that your Orator has become and is one of the largest and most sucessful brewers in the world and its plant and appliances are in every way adapted to the production of beer of the most wholesome and best qualities and of unexcelled purity.

III.

Your Orator further shows that from early in the history of the development of said business it has been the custom to expend large sums of money in the improvement and advancement of said brewery and the installation of improved machinery, methods and pro-
4 cesses thereat and also in the exploitation, advertising, marketing and sale of the products and beer of your Orator; that

in order to announce, designate and indicate the origin and manufacture of the said superior and high grade beer and other malt beverages, from and by your Orator, and in the year 1894 and before any use thereof by any other person, firm or corporation, in connection with the manufacture, marketing or sale of beer or other malt beverages had been made, originated, made use of and adapted and thereafter used as its trade mark and badge of identification and origin for and on its beer, brewed, prepared and matured by your Orator at its said brewery as herein stated, a fancy, peculiar, characteristic and distinctive and suitable symbol, device and label not theretofore used by any other person, firm or corporation in connection with the manufacture, sale, bottling, manufacturing, marketing or sale of beer or other malt beverages; that it is the practice of your Orator to affix said trade mark to the bottles containing lager beer and other malt liquors brewed, put up and bottled by your Orator, by the best scientific and improved processes, with the most skillful workmen, out of the best materials, and to the boxes and cases in which said bottles may be packed by means of suitable labels, pasted, tacked or otherwise fastened or by being printed or stenciled directly thereon; that the said trade mark and badge of identification and origin for its beer, brewed, prepared and matured by your Orator was a peculiar, characteristic, distinctive and suitable symbol, device and label not theretofore used by any other person, firm or corporation in connection with the manufacture, marketing or sale of beer or other malt beverages, and the essential and characteristic features thereof as follows:

A peculiar and characteristic shaped label, having a peculiar, characteristic and distinctive light brown color. Within the outer edges of the said label, a short distance therefrom, and parallel thereto, is a white line near and along the entire outer edges of the said label; conspicuously prominent in or about the center and right hand portion of said label is the said word "Schlitz" in fancy, characteristic white script letters arranged on a slight incline or angle upwards from left to right, with a peculiar and characteristic paraph, underneath the greater portion of the word, said letters and paraph being printed so as to appear in white with a heavy blue and fainter black shading following the outer line of said letters to give the impression that they are printed or written from raised type; the picture of the globe, the general trade mark of your Orator, is printed in blue, slightly above the center on the left hand side of the said label. Underneath the word "Schlitz" are the words in white, block letters "The Beer that made Milwaukee famous;" there is also other lettering on said label which does not, however, prominently stand out on your Orator's said label, all of which more fully appears from a specimen thereof showing the color and shape of the label and devices, symbol and words thereon, hereto annexed, marked "Exhibit A" and made a part hereof; that your Orator's label is, and has at all times since in or about the month of March, 1894, been placed upon its bottles, which are of a dark brown glass, so as to occupy the middle portion of the body of the bottle, all of which

further and more fully appears from a specimen bottle of your Orator's product, filed herewith, marked "Exhibit B" and made a part hereof.

IV.

Your Orator further shows that at the time of the adoption of said trade mark and label with said characteristic shape, color and lettering as your Orator's insignia, badge and trade mark for its said beer in bottles said trade mark and label and the characteristic features thereof as heretofore described had not been appropriated, applied or used as a trade mark, designation or in connection with the sale of beer or malt liquors, and your Orator further shows that very soon after its said beer was put upon the market in receptacles bearing said trade mark and label it acquired a superior re-
6 putation and an extensive demand for the same was created throughout the United States and in foreign countries including the State of Texas, and that the business of selling the same throughout the country including said State of Texas became very profitable and has rapidly increased, and that your Orator has at all times, since putting said beer upon the market, brewed said beer at its said brewery by a very expensive process in and by which the best barley, hops and other material were used and are used and that the high standard originally established by your Orator has been constantly maintained until the present time.

V.

That from and after the adoption of said trade mark your Orator printed, pasted, stamped and branded the said trade mark name "Schlitz" and the other peculiar features of its said trade mark, symbol, device and label upon the wrappers, bottles and upon the cases and receptacles containing said bottled beer so manufactured, brewed, bottled, packed and sold by your Orator; that by reason of the premises aforesaid your Orator has now and always has had as against the defendant and otherwise the exclusive right to use said label and said symbols and devices, badge, insignia and designation to distinguish and identify your Orator's particular and superior beer produced and brewed and bottled as hereinbefore set forth; that your Orator has expended large sums of money in the advertising of its said beer labeled and marked as heretofore described throughout the United States of America and foreign countries, including the State of Texas, by signs, plackards, wall-signs, bulletin boards, and advertisements in newspapers, magazines and otherwise, announcing and indicating and identifying the origin, manufacture and product of your Orator, and to a large extent described and advertised its said label and trade mark and the symbols and devices appearing on said label as the mark, badge, insignia and designation
7 which indicates, identifies and distinguishes the said beer as beer brewed and sold by your Orator; that by reason of the premises the said trade mark and the symbols and devices appearing on said label soon became and have continued and now are by the pub-

lic understood, used and employed to indicate and identify the beer of your Orator, and have become and are the trade mark, symbol and device of the said product of your Orator and have long been and are now used and employed by purchasers of said product as means of asking for, buying, selling and identifying the said product of your Orator; that by reason of the said superior quality of the beer brewed by your Orator and of the means used in announcing and advertising the product of your Orator, the demand for its product has been very great and has rapidly increased until during the six years last past the sale of beer in bottles, upon which said label, symbol and device appear and were placed, exceeded three hundred and fifty million (350,000,000) bottles.

VI.

Your Orator further shows that from the time it first began to sell beer bearing said symbol, device and label, appearing on said Exhibit A, filed herewith, and until now, the sale of said beer under said trade mark, symbol, device and label has been and now is a source of great profit to your Orator; that the public generally has recognized and acquiesced in your Orator's exclusive rights as aforesaid and by reason of the premises aforesaid there has come to be, and before the acts of the defendants hereinafter complained of, there existed in connection with the business of selling your Orator's product in bottles bearing said trade mark and label a good will of great value and importance to your Orator, which was a source of large profit to it and which good will it for a long time enjoyed without interruption and, which it says, it is equitably entitled to enjoy; and that except for the acts of the defendant hereinafter set forth the fruits of said business would have continued to be
8 uninterruptedly and exclusively enjoyed by your Orator without loss or trouble.

VIII.

Your Orator further shows that long after your Orator had adopted and used the peculiar and characteristic trade mark, symbol, device and label aforesaid upon and in connection with its beer in the manner aforesaid, and long after buyers, users and consumers of beer, and the public generally, had thoroughly associated the aforesaid trade mark, symbol, device and label of your Orator as a badge and insignia of identification of your Orator's said beer, and long after said trade mark, symbol and label and all the characteristic features thereof, as herein described severally and in combination, had become well established and known to buyers, users and consumers of beer and the public generally, as indicating and announcing the beer of your Orator's brewing and bottling, the defendant Houston Ice & Brewing Company, well knowing the great reputation of your Orator's beer and the exclusive rights of your Orator in and to the aforesaid peculiar trade mark, symbol, device and label, and each and all the peculiar and characteristic features thereof, for the

purpose of profiting by the great reputation of the beer brewed, put up, bottled and sold by your Orator, and for the purpose of diverting to itself the profits and gains which should result to your Orator from the business of selling your Orator's said bottled beer, and intending to profit by the demand created by your Orator for its said beer, and for the fraudulent purpose of deceiving and gulling the public and passing and palming off and substituting and enabling others to pass and palm off and substitute beer manufactured and sold by said defendant as and for the beer brewed and bottled by your Orator, and without acquiescence, license, permission or authority of or from your Orator, and, contrary to your Orator's wishes and desires, manufactured, brewed, bottled and put up, exposed for sale, manufactured, sold and delivered to consumers and
9 retail dealers and saloon keepers in the City of Houston, Harris County, Texas, in the City of Beaumont, Jefferson County, Texas, in the City of Waco, McLennan County, Texas, in the City of Bryan, Brazos County, Texas, in the City of LaPort, Harris County, Texas, in the City of Sugar Land, Fort Bend County, Texas, in the City of Galveston, Galveston County, Texas, in the City of Hearne, Robertson County, Texas, and elsewhere for use by said consumers, and to sell at retail by said retailers and saloon keepers beer not manufactured, brewed, bottled or put up by your Orator in bottles of the same shape, form and color as those used by your Orator, bearing in similation and imitation of your Orator's peculiar and characteristic symbol, device and label, a label upon which appeared fancy and characteristic symbols and devices in the following colors and with the following marks, to-wit:

A label having a light brown body color and within the outer edges of said label and near the outer edges thereof and parallel thereto, a white line extending around and near the edge of the said label, leaving a border or margin of light brown color along the edges of said label; occupying prominently the center and right hand portion of the said label are the words "Southern Select" in script letters arranged on a slight incline or angle upwards from left to right with a paraph underneath, the greater portion of the words, said letters and paraph being printed in and with the same style of lettering as is used by your Orator in printing the word "Schlitz" as aforesaid, said letters and paraph being printed so as to appear in white with a heavy blue and fainter black shading following the outline of the said letters, to give the impression that they are printed or written from raised type, with the picture of a red star encircled with a green wreath on a black background, and a picture of a magnolia flower in white and leaves of green in the center of said star, and the whole encircled with a wide band of blue located slightly above the center on the left hand side of the said label. Underneath the words "Southern Select" at the
10 bottom of said label, are the words in white block letters "Beer, Houston Ice & Brewing Company, Houston, Texas," all of which together with the printed matter on said label appear more fully from the specimen thereof showing the color and the devices and symbols and words thereon, which is annexed hereto,

marked "Exhibit C" and made a part hereof, and a specimen bottle of the defendant's product showing the color and shape of the bottle and the label with the devices, name and lettering thereon, and the manner in which the said label is placed upon the bottle by the defendant is filed herewith, marked "Exhibit B" and made a part hereof.

IX.

That from the year 1900 to the year 1912, and prior to the said wrongful and fraudulent use by the defendant of the said label, whereof Exhibit C is a specimen, the defendant Houston Ice & Brewing Company were wholesale jobbers of your Orator's beer in the State of Texas, and as such wholesalers ordered from your Orators, and sold in and about the States of Texas and Louisiana in excess of eight hundred (800) carloads of beer, aggregating upwards of twelve million (12,000,000) bottles, bearing the symbol, device, trademark and label whereof Exhibit A is a specimen; that all of said time during which the said Houston Ice & Brewing Company was a wholesale jobber of your Orator's product, your Orator had located in the State of Texas upwards of fifty (50) other wholesale jobbers of the said product located in various towns in the said State of Texas and enjoyed an extensive and ever increasing trade for its beer in kegs and in bottles, all of which the said Houston Ice & Brewing Company well knew, and that by reason of the superior quality of said beer brewed by your Orator and the means used in announcing and advertising the said product of your Orator and of distributing and marketing said product in the State of Texas, the demand for its beer in bottles in the State of Texas bear-
11 ing the peculiar and distinctive trademark, symbols, devices and labels, of which Exhibit A is a specimen, had increased from — bottles in the year 1900 to — bottles in the year 1912, and that said increase had until the acts complained of by the said defendant and herein set out been regular and continuous, and by reason of the use of said symbols, label and trademark and devices appearing upon the said trademark so marketed in the State of Texas and elsewhere as hereinbefore set out, the said trademark, symbol and device of your Orator have long been and now are used and employed by the purchasers of the said product in the State of Texas, as a means of asking for, buying, selling and identifying said product of your Orator.

Your Orator further shows that during the time that the said defendant Houston Ice & Brewing Company was such wholesale jobber of your Orator's product in the State of Texas and vicinity, it manufactured, put up, bottled and sold the beer of its own manufacture in bottles made of transparent glass, also commonly called light bottles, with a label entirely and distinctively different from the label, devices, trademark and lettering of your Orator's symbols, label, trademark and devices appearing upon your Orator's said product, to-wit:

A large white label, bearing in the center thereof the trademark

of the said Houston Ice & Brewing Company, a silver or drab colored star with a white magnolia flower, and green magnolia leaves thereon, encircled with a green wreath on a black background and a broad, red, circular border, upon and around which were the words in white block letters "Houston Ice & Brewing Co., Magnolia Brewery." To the left of said trademark, at or about the center of said label, in white margin, black type, on a curved line, were the words "Purity &" and on the right hand side of the said trademark in the same type, also curved, the word "Strength," with fancy, thin black line scrolls above and below the said words; above the said trademark and across the upper half of said label, in distinct black script, were the words "Houston Ice & Brewing Co." on a
12 horizontal line, and below the said trademark and words, across the lower half of said label, in large, plain script letters in a horizontal script line "Southern Select," and below the words "Southern Select" in dark, shaded lines, the words "Houston, Texas"; that parallel to the outward edge of the said label is a margin of three (3) compact black, lines, all of which more fully appears from a specimen bottle of the said beer of the said defendant Houston Ice & Brewing Company, bearing the said label, which is filed herewith, marked Exhibit E, and made a part hereof.

X.

Your Orator is further informed and verily believes and on such information and belief charges the fact to be that the defendant has in other ways unlawfully imitated your Orator's said peculiar and characteristic device, symbol, label and trademark in connection with the sale of beer by the defendant, brewed as aforesaid, and sold by said defendant all against your Orator's protest and against its consent, and to its great loss and injury actually sustained; that as a result of said fraudulent and imitative labels and the colors, devices and lettering placed by said defendant upon the bottles containing beer produced and put up by said defendant, the buyers, consumers and users of beer have been and are deceived, and the beer of said defendant has been and is constantly, systematically and habitually sold and disposed of by said defendants and by retailers supplied by said defendant as and for the beer of your Orator, and thereby buyers, users and consumers and the public are deceived; that the beer so manufactured and brewed and bottled by said defendant and exploited, marketed and offered for sale and sold by them and by such others in turn to the public, is of a very inferior quality to the aforesaid beer of your Orator and the sale thereof as and for the beer of your Orator has greatly injured and damaged the reputation of your Orator's beer and the sale thereof and the demand therefor; your Orator is further informed and be-
13 lieves and on such information and belief charges the fact to be that the defendant deliberately and purposely furnished and supplied and now furnishes and supplies beer manufactured, brewed, bottled and put up by it in bottles and receptacles bearing the aforesaid fraudulent and imitative label, to retailers and saloon

keepers in the city of Houston, Harris County, in the southern district of Texas and elsewhere, with the express intent and desire that the same shall be by said retail dealers and saloon keepers furnished and supplied to users and consumers and purchasers of beer who desire and ask for your Orator's beer, meaning thereby beer brewed and put up by your Orator; that said defendant in response to inquiries and demands for your Orator's beer, and with full knowledge on the part of said defendant, retailers and saloon keepers, without explanation, furnished and supplied and now furnish and supply the aforesaid inferior product of the defendant as and for the genuine beer brewed and bottled by your Orator; that said defendant well knows the effect of its fraudulent conduct in the premises but refuses to desist therefrom and continues to manufacture, brew, bottle and put up beer in bottles and receptacles containing and bearing the aforesaid fraudulent and imitative label of the color and with the words and devices thereon as aforesaid, and to sell, supply and market said beer as aforesaid; and your Orator verily believes said defendant will continue so to do; that the fraudulent and wrongful conduct of the said defendant has greatly injured and damaged the value of your Orator's exclusive property in, to and under said fancy and characteristic symbol, device, label and trademark; that the use by the said defendant of said fancy, characteristic label and symbols and devices thereon, and the peculiar characteristic features thereof, in the manner and form as herein set forth, is inequitable and unjust and constitutes an injury to your Orator and its business and the good will thereof, and promotes and enables an inequitable competition which will wholly ruin and destroy the rights and
14 property of your Orator and promotes and enables fraudulent competition which equity will enjoin.

Your Orator further shows that it was first advised of the wrongful and fraudulent conduct of the defendant in the premises and of the offering for sale and sale of said spurious, imitative and inferior beer, with the peculiar label and symbols and devices thereon, in or about the spring of 1913, and thereupon, after investigation your Orator caused due notice in writing to be served upon said defendant, advising said defendant of the rights of your Orator in the premises and requesting the said defendant thereafter to entirely desist and discontinue using the said label and symbols and devices in connection with the advertisement or sale of beer not made by your Orator unless the same was the genuine product made by your Orator; but said defendant has refused to desist from his conduct in the premises or to discontinue the use of the said symbol, devices and label upon the bottles of beer and receptacles containing said spurious and imitative beer not made or put up by your Orator, and still persists and continues in the use of said symbol, devices and label, and your Orator verily believes that said use of the said imitative symbol, devices and label will continue unless prevented by injunction.

Forasmuch, therefore, as your Orator is without remedy in the premises, save in a court of equity where such matters are cognizable and relievable, as to the end that said defendant may full, true and

perfect answer make to each and all of the allegations of this Bill of Complaint, but not under oath, answer under oath of the said defendant being hereby waived as by rule provided; that the hearing be had herein and the rights of your Orator in the premises adjudicated and established and that the said defendant, its agents, servants, attorneys and employes, and each of them, may be at first, during the pendancy of this suit, and afterwards perpetually enjoined and restrained from using and enjoying upon or in connection with the manufacture, advertisement, announcement, offering for
15 sale and sale of beer in bottles or similar products, the fancy characteristic label and symbols and devices therein in connection with the manufacture, brewing, advertisement, offering for sale or sale of beer in bottles in such a way or manner as to be calculated to induce the belief that beer not made or manufactured by your Orator is the product of your Orator, or from passing off or furnishing, or attempting to pass off, supply or furnish any beer not made by your Orator as the beer of your Orator, and that your Orator may have an accounting of and from the defendant of the gains and profits wrongfully attained and coming to the defendant by reason of his unlawful conduct in the premises, and also an assessment of damages arising and accruing to your Orator for and from and by reason of the wrongful conduct of the defendant in the premises, and that your Orator may have such other and further relief in the premises as shall be just and equitable.

Your Orator prays for the people's Writ of Injunction, first during the pendancy of this suit and afterwards perpetually, directed to the said defendant, its agents, servants, employes, successors and assigns, and to each of them, commanding and enjoining them in the manner and form as above prayed; and also a Writ of Subpœna directed to the said defendant, commanding it under penalty therein stated to appear before this Honorable Court, on the day therein named, in the City of Houston, in the State of Texas, there to make answer and abide by the further orders of the Court in the premises.

JOS. SCHLITZ BREWING CO.,
Complainant.

By JOSEPH E. UIHLEIN,
Its Vice Pres't and Gen'l Manager.

J. V. MEEK,
Solicitor for the Complainant.

KRONSHAGE, HANNAN & McMILLAN,
Of Counsel.

16 STATE OF WISCONSIN,
Milwaukee County, ss:

Joseph E. Uihlein, being first duly sworn, on oath deposes and says that he is the Vice President and General Manager of the Joseph Schlitz Brewing Company, complainant in the above and foregoing Bill of Complaint; that he has read said Bill of Complaint and that the allegations of said Bill are true in substance and effect, except as to those matters therein stated on information and belief

and as to those matters he believes it to be true; he further says that the reason why this affidavit is not made by the complainant is that the complainant is a corporation, that the deponent is an officer of the said corporation and is acquainted with the facts; that the grounds of his belief as to all matters therein stated to be on information and belief are based on information obtained from the records of the complainant corporation and from statements made to the deponent by officers and agents of the said corporation in the usual course of their duties and of the business of the said corporation.

JOSEPH E. UIHLEIN.

Subscribed and sworn to before me this 29th day of December, A. D. 1913.

[SEAL.] E. W. BYRON,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Aug. 20th, 1916.

17 EXHIBIT "A."

EXHIBIT "C."

Exhibit- "B," "D" and "E" filed herewith.

18 *Order Setting Motion for Temporary Injunction.*

Entered March 20th, 1914.

FRIDAY, March 20, 1914.

Court met pursuant to adjournment.

Present: Hon. W. T. Burns, Judge Presiding,
John E. Green, Jr., U. S. Attorney,
J. A. Herring, U. S. Marshal, and
L. C. Masterson, Clerk.

And, thereupon, the Court being opened in due form, by order of the Judge, the following proceedings were had, to-wit:

No. 44. In Equity.

JOSEPH SCHLITZ BREWING COMPANY

vs.

HOUSTON ICE & BREWING COMPANY.

Ordered that this case be set for hearing on Complainant's Motion for preliminary Injunction, for Monday, March 30, 1914, at 10 o'clock A. M.

19 *Answer.*

Filed June 10th, 1914.

In the District Court of the United States for the Southern District of Texas.

No. 44. In Equity.

JOSEPH SCHLITZ BREWING COMPANY, Complainant,

vs.

HOUSTON ICE & BREWING COMPANY, Defendant.

Answer.

This Defendant now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said Bill of Complaint contained, for answer thereto, or to so much thereof as this Defendant is advised it is material or necessary for it to make answer to, answering says:

I.

It admits the allegations in paragraph I of the Bill of Complaint.

II.

It has no knowledge of, and is without sufficient information to form a belief respecting the matters and things alleged in paragraph II of the Bill of Complaint.

III.

It has no knowledge of, and is without sufficient information to form a belief, respecting the matters and things alleged in paragraph III of the Bill of Complaint except that it admits that on the quart bottles of beer manufactured and sold by Complainant there are labels identical with those, a specimen of which is attached to the Bill of Complaint as Exhibit "A," and that on the pint bottles are similar labels except that they are smaller and the words and figures appearing thereon are proportionately reduced in size.

IV.

It has no knowledge of, and is without sufficient information to form a belief, respecting the matters and things alleged in paragraph IV of the Bill of Complaint.

V.

It has no knowledge of, and is without sufficient information to form a belief, respecting the matters and things alleged in paragraph V of the Bill of Complaint.

VI.

It has no knowledge of, and is without sufficient information to form a belief, respecting the matters and things alleged in paragraph VI of the Bill of Complaint.

VIII.

It admits that in bottling the beer manufactured by it, it uses, and for sometime has used, labels of the kind described in paragraph VIII of the Bill of Complaint and a specimen of which is attached to the Bill of Complaint and marked Exhibit "C." But it denies that there is such resemblance between said labels and the labels used by the Complainant as would cause one buying beer to be deceived in the kind he was buying. It especially denies that the labels used by it were designed by it or by anyone else for the purpose of imitating the labels of the Complainant or for the purpose of selling or ena-

bling anyone else to sell beer menufactured by this Defendant for beer manufactured by the Complainant.

21 It avers that the difference in appearance between the labels used by it and those used by the Complainant is very marked, and no one who was at all attentive to the kind of beer sold him, would, by reason of the labels, be misled as to the kind of beer given him. It avers that the Complainant's label attached as Exhibit "A" to the Bill of Complaint is not the label which is used on the same size bottle as that on which the Defendant's label attached as Exhibit "C" is used. That the label marked Exhibit "A" is used on quart bottles of beer manufactured by the Complainant while the label marked Exhibit "C" is used on pint bottles of beer manufactured by the Defendant. That the label used by the Complainant on pint bottles is very much smaller than the label shown as Exhibit "A" to the Bill of Complaint; and the difference between the label used by the Complainant on its pint bottles and that used by the Defendant on its, is very much more noticeable than the difference between the label shown as Exhibit "A" and Exhibit "C" to the Bill of Complaint. The defendant attaches hereto as Exhibit "A" and "B" respectively, and asks that they may be made a part hereof, specimens of the labels used by it on its pint bottles and the labels used by the Complainant on its pint bottles.

The Defendant avers that the difference between said two labels is obvious and is so great that a bottle labeled with one would not naturally or probably be taken for a bottle labeled with the other. That the label of this Defendant is a much larger label, being almost as large, if not quite, as the label used by the Complainant on its quart bottles. That its label is of altogether different shape, being rectangular in shape; while the other is in the shape of a parallelogram. That its label is distinctly marked in large letters with the words "Houston Ice & Brewing Company, Houston, Texas," indicating clearly that it designates beer manufactured by this Defendant and no other; while the Complainant's label is not so marked. That its label has on it the trade mark of this Defendant, consisting in part of a white magnolia on a bright red star; while nothing similar

22 appears on the Complainant's label. That its label has on it none of the words appearing on the Complainant's label except the one word "Beer" and is otherwise radically different from the label of the Complainant.

That the total absence of such similarity in the appearance of the bottles of beer manufactured by this Defendant and those manufactured by the Complainant as would cause one beer to be taken for the other is manifestly apparent from other distinguishing marks on the bottles. The bottle of the Complainant has no neck label but only a small crescent shaped label in two colors, extending not so much as half way around the bottle, and placed below the neck of the bottle, a specimen of this label being hereto attached and marked Exhibit "D;" while the bottle of this Defendant has a neck label made in all the colors of the larger label above referred to, pasted on the neck of the bottle, and extending around the neck thereof, a

specimen of this label being attached hereto and marked Exhibit "E" and made a part hereof.

This Defendant prays leave to refer to, and to have considered a part hereof, a pint bottle of beer manufactured by it, marked Exhibit "F," and deposited in court herewith —, and a pint bottle of beer manufactured by the Complainant, marked Exhibit "G," and deposited in court herewith.

The Defendant represents that it or its predecessors, to all of whose rights it suceeded, including their rights in the established reputation of beer manufactured by them, have been engaged in the manufacture of beer in Houston in the Southern District of Texas for more than twenty years and in that time have built up, and the Defendant now enjoys, a large sale of the beer manufactured by it, throughout the states of Texas, Louisiana, Arkansas and Oklahoma and elsewhere. That while it has not had the advantage of developing its trade and its business in so thickly populated a section of the country as has the Complainant, and, therefore, its business is small compared with Complainant's; yet, never-
23 theless, it has been the uniform policy of this Defendant, at all times, to use the very best machinery, apparatus and appliances known to the trade in the manufacture of its beer; to use the purest and best and highest grade of materials, and to ascertain, adopt and use those processes which were best calculated to produce a beer of the highest quality. That this fact, together with the further fact that there abounds in the locality in which Defendant's brewery is situated, a supply of natural water peculiarly adapted to the manufacture of beer of the highest quality, which is not to be found where other breweries are located, notably that of the Complainant, has enabled this Defendant to manufacture and offer to the trade a beer the equal of any manufactured and superior to that of many breweries, including the Complainant's. That wherever both beers are equally well known, the beer of the Defendant, generally speaking, is preferred to that of Complainant because of its superior excellence. This Defendant denies, therefore, either that it did desire to imitate the label of the Complainant for the purpose of palming off its beer for the beer of the Complainant or that there was any reason why it should do so.

IX.

It admits that, during the years alleged in paragraph IX of the Bill of Complaint, it was a jobber of beer manufactured by the Complainant and that it sold a large number of carloads of said beer, and it admits that such of the beer that it sold as was in quart bottles bore on it the label whereof "Exhibit "A," attached to the Bill of Complaint, is a specimen, but it denies that such of the beer as was in pint bottles, which was by far the larger part, bore such labels; the labels that such bottles bore being smaller labels whereof Exhibit "B" to this answer is a specimen. It avers, however, that at the same time it was itself manufacturing beer and the demand for its beer was increasing from year to year.

24 It admits that at the time referred to in paragraph IX of the Bill of Complaint it was using, in part, light bottles for bottling its beer; and it admits that when a light bottle was used by it, it used a label such as that described in paragraph IX of the Bill of Complaint. It avers also that it still uses such light bottles and such labels. It avers, however, that an opinion or belief is becoming prevalent that the darker bottles are better adapted for use in bottling beer than the light bottles, because of the effect of the rays of light on the beer, and the use of the dark bottles is becoming more and more common. That it is a recognized fact, in the trade, that there should be some harmony of color between the label and the bottle. That all of the leading breweries recognize this. That in consequence of this, this defendant uses a light label described in paragraph IX of the Bill of Complaint when using the light bottles and uses a dark brown label when using the brown bottles.

This defendant avers that it is the common practice of the breweries, with but few exceptions, for one to use the bottles of the other. That but few, if any, of the breweries in Texas, of which there are a number located at Galveston, Houston, San Antonio, Fort Worth and Dallas, buy new bottles but all of them buy bottles which have been used. That a large manufacturer and shipper of beer to Texas is the Anheuser-Busch Brewing Association of St. Louis, Missouri. That large quantities of its bottled beer are shipped to Texas and consumed here. That the bottles used by it, for the most part, are light bottles. From this it results that many of the used bottles which are offered to the breweries in Texas, including this defendant, are light bottles. That on the other hand many of the large breweries outside of the state, who ship beer into the state, use a dark brown bottle such as that deposited in court as Exhibit "G." That many of such used bottles are bought by the breweries in Texas, including this defendant. That many of each kind of bottles are shipped back to the breweries from which they came.

25 That the breweries outside of the state, and especially the complainant, encourage the use of their bottles by other breweries. That the dealers in Texas are offered for the return of them but little more than the cost of new bottles in Texas, from which it results that comparatively few bottles are returned and they buy and manufacture and use a large percentage of new bottles. That if they desired to prevent other breweries from using their empty bottles, they could accomplish this by having their name blown in the bottle; but this, with rare exceptions, they do not do. Generally speaking, there is no marl whatever on the brown bottles which are found in Texas. The Defendant avers, therefore, that its use of a brown bottle similar to that used by the Complainant is wholly without significance and that its practice in this regard is the same as the practice of breweries generally in the State of Texas.

X.

It denies all and singular the allegations contained in paragraph X of the Bill of Complaint.

It admits that on or about September 16, 1913, Complainant, by its attorneys, wrote a letter to this Defendant making some such claim as that set forth in the Bill of Complaint. This Defendant alleges that it realized then as it avers now that there was no just cause of complaint on the part of Complainant and that there was no such similarity between the label used by this Defendant and the label used by the Complainant as to give rise to any of the suspicions or fears which the Complainant had, or any of the charges that it made. However, in order that there might not be the least cause of complaint, this Defendant voluntarily determined to change its label and it caused its attorneys to write the attorneys of the Complainant accordingly. The Defendant attaches hereto a copy of the two letters referred to, marked Exhibits "H" and "I," respectively.

26 It further represents that it has changed its label and has procured one million (1,000,000) of the kind shown by the specimen attached hereto and marked Exhibit "J." That it has changed not its main label only, but the neck label as well, and attaches hereto a specimen of this label marked Exhibit "K.". That it still has on hand a balance of the supply of old labels amounting to about 250,000. That as soon as this supply is exhausted it proposes and will use the new labels referred to. The Defendant has deposited in court and prays leave to refer to in connection herewith, a bottle of beer manufactured by it with the new label thereon, marked Exhibit "L."

This Defendant denies all and all manner of unlawful combination and confederacy wherewith it is, by said Bill of Complaint, charged; without this, if there is any other matter, cause or thing in said Bill of Complaint contained material or necessary for this defendant to make answer to, and not herein and hereby already and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge and belief of this Defendant, all of which the matters and things this Defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismissed with its reasonable cost and charges in this behalf most wrongfully sustained.

HOUSTON ICE & BREWING COMPANY,
By H. HAMILTON,
President.

Attest:
J. H. STUDDERT,
Secretary.

[SEAL.]

BAKER, BOTTS, PARKER & GARWOOD,
Solicitors for Defendant, Houston Ice & Brewing Company.

27 STATE OF TEXAS,
County of Harris:

H. Hamilton, being first duly sworn on oath deposes and says that he is the President of the Houston Ice & Brewing Company, the Defendant in the above suit; that he has read the foregoing answer and that the allegations of said answer are true in substance and effect.

H. HAMILTON.

Subscribed and sworn to before me this 16th day of April, 1914.

[SEAL.] AGNES E. BROWN,
Notary Public in and for Harris County, Texas.

"Exhibit "A" to Answer, Defendant's label for pint bottles, omitted from the printed record, being identical with Exhibit "C" to the Bill of Complaint, heretofore copied at page 17.

* * * * * * *

EXHIBIT "B."

28 EXHIBIT "D."

EXHIBIT "E."

Exhibit "F" is a pint bottle of "Southern Select" beer.

Exhibit "G" is a pint bottle of "Schlitz" beer.

MILWAUKEE, WIS., Sept. 16, 1913.

Houston Ice & Brewing Co., Houston, Texas.

GENTLEMEN: The Schlitz Brewing Company of this city has submitted to us, with instructions to protect its rights against infringement, the facts and circumstances which have just come to its attention regarding the placing on the market by you of beer in bottles bearing a label which is manifestly made in simulation of the Schlitz label.

The manner in which the words "Southern Select" is placed upon the label, the raised script style of shaded lettering on the brown background, the duplication of the Schlitz "S" and of the triangular underscoring as in the Schlitz label, and the small block lettering at the bottom of the label and the location and coloring of the trade mark on the label, clearly indicate an intention to mislead and deceive purchasers.

Not only is the use of this label a violation of the right of our client under the common law and the Federal Statutes under which it has registered its label and the trade mark in the patent office of the United States, but it is also a violation of the Statutes of Texas.

You are undoubtedly aware that your use of this label is of such a nature in so far as it is a simulation of the label of our client
30 as to enable retail dealers to cause consumers to believe that the contents of the bottle are also the products of our client, a representation which is of course entirely false and untrue, but which is a natural consequence of the close imitation of the word "Schlitz" in script upon the label, in company with the brown color of the label, which are commonly known and understood throughout the country as well as in foreign countries to indicate the superior quality of beer produced and marketed by the Joseph Schlitz Brewing Company of Milwaukee, Wisconsin.

We are writing you at this time to give you fair notice and demand that you immediately discontinue the further use of these imitative labels. We shall expect your reply to that effect by October 15th next.

In case of your failure so to do we shall of course be obliged to commence suit to protect and enforce the rights of our clients by injunction or such other proceedings as may be necessary in the premises.

Yours very truly,
(Signed) KRONSHAGE, HANNAN & McMILLAN.

J.W.H./HG.

Oct. 2nd, 1913.

Houston Ice & Brewing Company Label.

lessrs. Kronshage, Hannan & McMillan, 1102-1110 Wells Building, Milwaukee, Wis.

GENTLEMEN: Your letter of September 16th to the Houston Ice & rewing Company was referred to us. The Houston Ice & Brewing ompany, as much as the Joseph Schlitz Brewing Company, desires at there should be no room for mistaking the beer of one company r that of the other, and if there is any similarity between the labels hich might cause this it resulted far from any design on the part the Houston Ice & Brewing Company that this should be the case. It may be that the person designing the label had the Schlitz label before him in designing the letters. As to this we are not informed.

The size and the shape both of the main label and the smaller bel used on the bottles respectively ought to go a long ways in eventing any mistaking one kind of beer for the other. At the me time, the Houston Ice & Brewing Company will change the ttering on its label and will endeavor to see that there is no just use of complaint on the part of your client.

Yours very truly,

(Signed) BAKER, BOTTS, PARKER & GARWOOD.

EXHIBIT "J."

32 EXHIBIT "K."

NOTE—The above label is indentical with "Exhibit K" in the original transcript, except that the words "Houston Ice & Brewing Co., Houston, Texas," printed on the original, do not appear in full on the copies furnished for insertion in the printed copies of the record.

FRANK H. MORTIMER, *Clerk.*

Exhibit "L" is a bottle of "Southern Select" beer with the new label of defendant appearing thereon.

Reply.

Filed June 10th, 1914.

In the District Court of the United States for the Southern District of Texas.

No. 44.

JOSEPH SCHLITZ BREWING COMPANY, Complainant,

vs.

HOUSTON ICE & BREWING COMPANY, Defendant.

Reply.

This Complainant now and at all times hereafter, saving and reserving to itself all and all manner of advantages of exception and otherwise, which may be had or taken in the manifold errors, uncertainties and insufficiencies of the Answer of the Defendant Houston Ice & Brewing Company, for reply thereunto, says, that it does and will aver, maintain and prove its said Bill to be true, certain and sufficient in the law to be answered unto by the defendant and that the Answer of the said defendant is very uncertain, evasive and insufficient in the law to be replied unto without that it admits that the specimen of label attached to the Bill of Complaint as Exhibit "A" is of slightly larger size than the

33

label placed upon the pint bottles of your Orator, all of which is manifest from a specimen filed with the said Complaint, marked Exhibit "B"; that in all other respects the said label in color and the symbols, devices, insignia, letterpress, arrangement, and location upon the bottle, as well as the color of the bottle used are identical, as fully appears from a casual examination of the said "Exhibits B and D" filed with the complaint.

Further replying to the defendant's alleged pretences that they have no design to infringe your Orator's label, and their further attempt to distinguish defendant's label from that of the complainant's, your Orator avers and submits to this Honorable Court that all of the salient features, color, arrangement of design, appearance of your Orator's trade mark, label, letter-press, location upon the bottle, color of bottle and every other conspicuously prominent, fancy and characteristic element of your Orator's label and trade mark, including color, location and general get up and dress, are imitated not only by the original unlawful label complained of, but by the pretended, fraudulent and imitative substitute offered in the answer of the said defendant, "Exhibit J," attached to defendant's answer, and that the said label, defendant's "Exhibit J" is an infringement of your Orator's said characteristic trade mark and label, and the color, appearance and distinguishing and characteristic features thereof.

34 Your Orator further avers and submits to this Honorable Court, that the defendant, by offering to adopt such substituted label as aforesaid, "Exhibit J," conclusively negatives its pretences contained in its said answer and letter, of no design to infringe your Orator's trade mark and label, and your Orator submits that the defendant is not honestly endeavoring to sell its goods upon their own merits but by the simulation of your Orator's trade mark and label, in color, appearance and characteristic get up, is endeavoring to appropriate a share of your Orator's good will acquired by extensive advertising and distribution of its superior product; that it is evident from the simulation of the general appearance, features and color of your Orator's trade mark and label, that the defendant has not adopted such design for his label upon his product by inadvertence, ignorance or mistake, but with the design and intention of profiting by your Orator's good will as hereinbefore alleged, all of which matters and things, in addition to the allegations of its complaint, your Orator is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by the said Bill it has already prayed.

KRONSHAGE, HANNAN & McMILLAN.

Order Refusing Temporary Writ of Injunction.

Filed October 6th, 1914.

In the District Court of the United States for the Southern District of Texas.

No. 44, In Equity.

JOSEPH SCHLITZ BREWING COMPANY, Complainant,

versus

HOUSTON ICE & BREWING COMPANY, Defendant.

Order Refusing Temporary Writ of Injunction.

On the 10th day of June, 1914, this cause came on to be heard, in Chambers, upon the application of the Complainant contained
35 in the bill of complaint, on file herein, for a temporary writ of Injunction and was argued by counsel, and thereupon, upon consideration thereof, it was on the 2nd day of October, 1914,

Ordered that the said application be denied and that said temporary writ of injunction be, and the same was in all respects denied and refused.

W. T. BURNS,
United States District Judge.

Order of Court Amending Bill of Complaint.

Filed February 11, 1915.

In the District Court of the United States for the Southern District of Texas.

No. 44. In Equity.

JOSEPH SCHLITZ BREWING CO.

vs.

HOUSTON ICE & BREWING COMPANY.

Upon the record filed and proceedings herein, and upon the amended petition for amendment and consent of counsel herein, it is ordered that H. Hamilton, R. L. Autrey, James H. Studdert, Jesse Andrews, Joseph F. Mayer, B. A. Riesner and D. Rossi as trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company be and

they are hereby made parties defendants to this cause, and that paragraph III of said Bill of Complaint be and the same is amended by adding thereto the allegations, matters, facts and things set out at length in said petition and amendment as if herein set out at length but not herein repeated for brevity.

36 It is further ordered that said defendants make answer to the said Bill of Complaint as herein hereby amended on or before the twentieth day of February, A. D. 1915.

W. T. BURNS,
United States District Judge.

First Amended Bill of Complaint.

Filed February 11, 1915.

In the District Court of the United States for the Southern District of Texas.

No. —. In Equity.

JOSEPH SCHLITZ BREWING COMPANY, Complainant,

vs.

HOUSTON ICE & BREWING COMPANY, Defendant.

Now on this the 10th day of February, A. D. 1915, by consent of counsel, and by leave of the court, complainant amends its bill of complaint in the following particulars, to-wit:

I.

By adding immediately after and as a part of paragraph numbered one in the original bill, the following:—

Your Orator is informed and believes, and upon such information and belief charges the fact to be, that since the commencement of this action, and on or about the 21st of October, 1914, more than four-fifths in interest of all the stockholders of the Houston Ice & Brewing Company at a stockholders' meeting, called and held, voted in favor of and signed their consent in writing to the voluntary dissolution of said corporation; that on or about the 9th day of January, A. D. 1915, a certified copy of such consent to the voluntary dissolution of said corporation was filed in the office of the Secretary of State of the State of Texas, and his certificate of such filing thereupon issued; that the officers and directors of said corporation,

37 at the time of such dissolution were H. Hamilton, President, H. B. Rice, Vice-President, R. L. Autrey, 2nd Vice-President & Treasurer, James H. Studdert, Secretary, Joseph F. Mayer, B. A. Riesner, and D. Rossi; that on or about the 21st day of October, 1914, the Houston Ice & Brewing Company, a corporation, for and in consideration of the sum of One ($1.00) Dollar and 12,000

shares of the Association next hereafter mentioned and other consideration to it in hand paid by H. Hamilton, R. L. Autrey, James H. Studdert, Jesse Andrews, Joseph F. Meyer, B. A. Riesner and D. Rossi, as trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, conveyed to said persons as such trustees, as aforesaid all the property, real, personal or mixed, of every kind whatsoever and wherever situated, owned by it, or in which it had an interest except only its minute and stock books and its corporate seal.

II.

Your orator further amends its bill of complaint in the following particulars, by adding to the said bill of complaint immediately following the paragraph numbered III, the following allegations, matters, facts and things:

Your orator further shows that an application for the registration of the "Globe" Trade Mark, the general trade mark of your Orator, was duly filed in the office of the Commissioner of Patents of the United States at Washington, D. C., in the year 1888, pursuant to the statutes of the United States of America on that subject made and provided, and that in said year 1888 said trade mark was duly registered in the office of the Commissioner of Patents by the said Commissioner of Patents at Washington, D. C., pursuant to said statutes of the United States of America and the official certificate of the Patent Office of the United States duly issued by said Commissioner of Patents, numbered 15,646. That on the 25th day of October, 1911, your orator filed in the office of the Commissioner of Patents at Washington, D. C., pursuant to the statutes of
38 the United States, an application for the registration of the said "Globe" Trade mark, and that on or about the 4th day of March, 1913, said trade mark was again duly registered in the office of the Commissioner of Patents by the said Commissioner of Patents at Washington, D. C., pursuant to the said statutes of the United States of America and amendments thereof, and the official certificate of the patent office of the United States duly issued by the said Commissioner of Patents, numbered 90,587, and evidencing the said registration of said trade mark aforesaid as duly issued to your orator. Your Orator further shows that an application for the registration of said trademark label was duly filed in the office of the Commissioner of Patents of the United States in the City of Washington, D. C., on the 16th day of February, 1895, pursuant to the statutes of the United States of America on that subject made and provided, and that during the month of April, 1895, said trade mark was duly registered in the office of said Commissioner of Patents, by said Commissioner of Patents, pursuant to said statutes of the United States of America, and the official certificate of the Patent Office of the United States duly issued to your orator by said Commissioner of Patents, numbered 26,385, as evidencing the registration of said trade mark aforesaid; that pursuant to the statutes of the United States of America on that subject made and provided, as amended

by an Act of Congress, approved on the 20th day of February, 1905, application for re-registration of said trade mark label was duly filed on the 4th day of August, 1905, in the office of the Commissioner of Patents of the United States, in the City of Washington, D. C., and on the first day of May, 1906, said trade mark was duly registered in the office of said Commissioner of Patents pursuant to said statutes of the United States of America, and the official certificate of the Patent Office of the United States duly issued to your orator by said Commissioner of Patents, numbered 52,011, and evidencing the re-registration of said trade mark aforesaid; that since said year 1894, as aforesaid, the said Joseph Schlitz Brewing Company
39 has used and employed the "Globe" trade mark in connection with its said trade mark label Exhibit "A," colored in blue; that ever since the adoption of said trade mark label in said year, 1894, upwards of eighty per cent (80%) of the entire product of your orator's Brewery which is put up in bottles was and is put in dark brown bottles having the peculiar and characteristic label, Exhibit "A," in the light brown body color as shown in Exhibit "A," and bearing the white script and block lettering thereon and the blue picture of the Globe trade mark substantially as shown in said Exhibit "A" that practically all of the beer in bottles of your orator's product shipped to the State of Texas, an aggregate of approximately fifty million bottles during the last six years have said trade mark label attached thereto in the relative position shown on the Exhibit of your orator's product in the bottle and with said peculiar and distinctive coloring arrangement and location of said label on each of the said fifty million bottles; that your orator has continued its said business and used said symbols and devices and label, constituting said trade mark as registered in the year 1895, in its said business without change or variation, excepting that in the year 1894, your orator inserted the words "The Beer that made Milwaukee Famous" in white block letters, underneath said word "Schlitz" and inserted the words "The Brewery's Own Bottling" in faint black lettering underneath said globe instead of below said words "Schlitz" and that during the year 1906 your orator omitted the words "The Brewery's own Bottling" from underneath said globe and inserted said words "The Brewery's own Bottling" in black letters, immediately above said word "Schlitz," upon your orator's label; that the distinctive feature of said trade mark label of your Orator, to-wit, the blue Globe picture, the white script and block lettering, and the light brown body color of said trade mark label placed upon the bottles of a dark brown colored glass so as to occupy the middle portion of the body of said bottel have been continuously
40 used and employed by your Orator to announce its said beer in bottles during all of the time since the year 1894, and are now so employed that the said trade mark label was duly registered under the Act of Congress approved February 20th, 1905, as hereinbefore alleged; that said trade mark, and each and every part thereof, all and singular, was and has been continuously used by your Orator since on or about the 15th day of May, 1894, in and about its said business, and never ceased to exist and to be your Orator's

exclusive property; and that the rights and property so acquired by your Orator in and to said trade mark under the statutes of the United States of America on that subject made and provided, as well as its rights and property at common law, have not been in any wise alienated, transferred or waived; and that your Orator is now the sole and exclusive owner of said symbols, devices and trade marks and all rights and property acquired by your Orator under the statutes of the United States of America and at common law.

Wherefore your Orator prays that the aforementioned H. Hamilton, R. L.Autrey, James H. Studdert, Jesse Andrews, Joseph F. Meyer, B. A. Riesner and D. Rossi, as trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company, be made parties to this cause; that said Bill of Complaint be amended by adding to paragraph III thereof the allegations, matters, facts and things hereinbefore herein set out, and that the new defendants above named may full, true and perfect answer make to each and all of the allegations in said bill of complaint as hereby amended but not under oath, answer under oath of said defendants being hereby waived as by rule provided, that the hearing be had and the rights of your Orator in the premises adjudicated and established, and that said defendants, their successors, agents, servants, attorneys and employees, and each of them
41 may be perpetually enjoined and restrained from using and employing upon or in connection with the manufacture, advertisement, announcement, offering for sale and sale of beer in bottles or similar products, the fancy characteristic label and symbols and devices therein in connection with the manufacture, brewing, advertisement, offering for sale or sale of beer in bottles in such a way or manner as to be calculated to induce the belief that beer not made or manufactured by your Orator is the product of your Orator, or from passing off or furnishing, or attempting to pass off, supply or furnish any beer not made by your Orator as the beer of your Orator. Your Orator prays for such other and further relief in the premises as should be just and equitable, and as prayed for in the original bill of complaint.

J. W. McMILLAN,
Att'y for Joseph Schlitz Brewing Co., Complainants.
J. V. MEEK,
Solicitors for the Complainants.
KRONSHAGE, HANNAH & McMILLAN,
Of Counsel.

THE STATE OF TEXAS,
County of Harris:

J. W. McMillan, being first duly sworn, on oath says that he is one of counsel for the Joseph Schlitz Brewing Company, complainants above named; that he has read the amendments to said bill of complaint and that the allegations to said amendment of the Bill of Complaint are true in substance and effect, except as to those mat-

ters therein stated on information and belief and as to those matters he believes it to be true; that the reason why this affidavit is not made by the complainant is that the camplainant is a corporation; that the affiant is personally acquainted with the material facts and things herein alleged in its behalf; that the grounds of his information and belief are based upon information obtained from the records of the
42 complainant and in public offices and from statements made to affiant by officers and agents of the complainant corporation, and others in the premises in the usual course of their duty and of the business of said corporation.

J. W. McMILLAN.

Subscribed and sworn to before me this the 10th day of February, A. D. 1915.

[SEAL.] MYRTLE HAMILTON,
Notary Public in and for Harris County, Texas.

We hereby consent to the amendments to the Bill of Complaint in the manner herein prayed, the interlineation on the first page having first been made by the solicitors for the defendant.

BAKER, BOTTS, PARKER, GARWOOD,
Solicitors for Complainants.

J. V. MEEK,
Solicitor for Complainants.

Answer to Amended Bill.

Filed Mch. 27, 1915.

In the District Court of the United States for the Southern District of Texas.

No. 44. In Equity.

JOS. SCHLITZ BREWING COMPANY, Complainant,

vs.

HOUSTON ICE & BREWING COMPANY, Defendant.

I.

Now come H. Hamilton, H. B. Rice, R. L. Autrey, James H. Studdert, Jos. F. Meyer, B. A. Riesner and D. Rossi and say that it — true as alleged in the amendment to the bill of com-
43 plaint on file herein that by due and proper corporate action the Houston Ice & Brewing Company named as defendant herein has been voluntarily dissolved since the filing of this suit and that they were at the time of said dissolution, to-wit: January 9, 1915, the Directors of said corporation and H. Hamilton, H. B. Rice, R. L. Autrey and James H. Studdert were the President, Vice-

President, Second Vice-President and Treasurer, and Secretary, respectively, of said corporation, but they aver that as shown by said amendment said corporation prior to its dissolution conveyed all of its property of every kind whatsoever except its minute and stock books and corporate seal to H. Hamilton, R. L. Autrey, James H. Studdert, Jesse Andrews, Jos. F. Meyer, B. A. Riesner and D. Rossi, as Trustees of the Houston Ice & Brewing Association, under a Declaration of Trust dated October 20th, 1914, which association became and is the owner of all of the property of said corporation, including the labels of the same referred to in the bill of complaint and the answer, and is conducting, continuing and carrying on the business formerly carried on by said corporation, and that the said H. Hamilton, H. B. Rice, R. L. Autrey, James H. Studdert, Jos. F. Meyer, B. A. Reisner and D. Rossi in their capacity as Directors or officers of said corporation, are not necessary or proper parties to this suit and they pray that they may be hence dismissed.

II.

They aver in the alternative that if they are not dismissed the allegations in the answer of said corporation are true and they adopt the same as their answer to the bill of complaint and the amendment thereto, except that they add that they have no knowledge of, and are without sufficient information to form a belief, respecting the matters and things alleged in Paragraph II of the amendment to the bill of complaint.

44

III.

The Houston Ice & Brewing Association, a voluntary association, composed of the Trustees named in the bill of complaint, organized and existing under a Declaration of Trust dated October 20th, 1914, admits the allegations contained in paragraph I of the amendment to the bill of complaint. It avers that it, on October 21st, 1914, purchased of the Houston Ice & Brewing Company all of the property of the latter company, except its minute and stock book and corporate seal for twelve thousand (12,000) of its own certificates or shares of beneficial interest and that it immediately went into possession of said property and is now, and has ever since been, conducting, continuing and carrying on the business, formerly carried on by said corporation. It makes itself a party defendant to this suit and prays that it may defend the same in its own name, or in that of the former corporation.

IV.

For answer to the Bill of Complaint and the amendment thereto it avers that the allegations in the answer of Houston Ice & Brewing Company are true and it adopts said answer as its answer.

V.

It has no knowledge of, and is without sufficient information to form a belief, respecting the matters and things alleged in paragraph II of the amendment to the bill of complaint.

H. HAMILTON,
H. B. RICE,
R. L. AUTREY,
JAMES H. STUDDERT,
JOS. F. MEYER,
B. A. RIESNER,
And
D. ROSSI,
In Their Capacity of Directors and Officers of the Houston Ice & Brewing Company Dissolved,
By BAKER, BOTTS, PARKER & GARWOOD,
Their Solicitors.
And
HOUSTON ICE & BREWING ASSOCIATION,
By H. HAMILTON, *President.*
BAKER, BOTTS, PARKER & GARWOOD,
Solicitors for Houston Ice & Brewing Association.

Attest:
[SEAL.] J. H. STUDDERT, *Secretary.*

THE STATE OF TEXAS,
County of Harris:

H. Hamilton, being first duly sworn on oath deposes and says that he was the President of Houston Ice & Brewing Company at the time of its dissolution and is President of Houston Ice & Brewing Association; that he has read the foregoing answer and that the allegations in said answer are true in substance and effect.

H. HAMILTON.

Subscribed and sworn to before me this 25th day of March, A. D. 1915.

[SEAL.] RAYMOND NEILSON,
Notary Public in and for Harris County, Texas.

It is ordered that the time within which to perfect the appeal in the above entitled cause be, and the same hereby is extended for sixty days from and after this date.

Dated this June 14th, 1916.

By the Court.

W. T. BURNS,
District Judge.

49 *Notice of Application for Approval of Statement of Evidence and Proceedings Under Equity Rule No. 75.*

Filed Aug. 4, 1916.

In the District Court of the United States for the Southern District of Texas.

In Equity. No. 44.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDERT, JESSE ANDREWS, JOSEPH F. MEYER, B. A. Reisner, and D. Rossi, as Trustees of the Houston Ice & Brewing Association, under a Declaration of Trust, dated October 20th, 1914, and otherwise, as Successors and Assigns of the said Houston Ice & Brewing Company, Defendants.

To Messrs. Baker, Botts, Parker & Garwood, Jesse Andrews and W. H. Walne, Attorneys of Record for the Defendants above named:

You will please take notice that we have applied to the District Court of the United States in and for the Southern District of Texas, for the allowance of an appeal to Joseph Schlitz Brewing Company from the final judgment, order and decree entered herein on April 11th, 1916, and for an order fixing the amount of bond upon said appeal, for all damages and costs in case said Joseph Schlitz brewing Company fails to make said appeal good, and will file our Præcipe for record and statement of evidence pursuant to Rule of Practice in Equity, No. 75.

You will further take notice that we will apply to said District Court of the United States in and for the Southern District of Texas, Honorable W. T. Burns, Judge Presiding, on the — day of August, 1916, at — o'clock, —, M., or as soon thereafter as counsel can be heard for the approval of said statement heretofore prepared by complainant of the evidence and proceedings had in this
50 cause and for such other relief in that behalf as may be proper under the Rules of Practice in Equity.

J. V. MEEK,
THEODORE KRONSHAGE, Jr.,
J. W. McMILLAN,
Solicitors and of Counsel for Joseph Schlitz Brewing Company, Plaintiff Herein.

In the District Court of the United States for the Southern District of Texas.

In Equity. No. 44.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, James H. Studdert, Jesse Andrews, Joseph F. Meyer, B. A. Riesner, and D. Rossi, as Trustee of the Houston Ice & Brewing Association, under a Declaration of Trust, dated October 20th, 1914, and otherwise, as Successors of the said Houston Ice & Brewing Company, Defendants.

Certificate of Evidence and Exceptions Under Equity Rule No. 75.

Filed Aug. 4, 1916. L. C. Masterson, Clerk.

The said Joseph Schlitz Brewing Company having prayed and been allowed an appeal from the judgment, order and decree entered herein on the 11th day of April A. D. 1916, and each and every part thereof to the United States Circuit Court of Appeals in and for the Fifth Circuit, the Court for the purpose of completing the record in the above entitled cause, respecting the proceedings had in said cause and to enable the said Joseph Schlitz Brewing Company to
51 have said proceedings and the judgment, orders and decree entered therein, reviewed upon said appeal, does hereby certify that the following proceedings were had in said cause at the respective times hereinafter stated:

That on March 14, 1914, the said Joseph Schlitz Brewing Company filed in this court its bill of complaint in equity praying that the defendant Houston Ice & Brewing Company, its agents, servants, etc., be enjoined and restrained from using or attempting to use upon or in connection with the sale of beer in brown or dark amber glass bottles, of badge or label in similitude to the trade mark label theretofore adopted, registered and used by the complainant in commerce between the several States of United States, including the States of Texas and Louisiana, and in foreign countries including the country of Mexico, for a temporary restraining order pending the hearing upon said bill and other relief.

That on the 20th day of March, 1914, this court made and filed its order setting motion of the plaintiff for a temporary injunction.

That thereafter and on the 10th day of June, 1914, said complainant appeared by J. V. Meek and Theodore Kronshage, Jr. in support of the said motion for temporary injunction.

That there appeared in opposition to said motion, Jesse Andrews, Esq., of Messrs. Baker, Botts, Parker & Garwood, solicitor and of counsel for the defendant.

That said Joseph Schlitz Brewing Company in support of its said verified bill of compliant with which were filed as exhibits one bottle

55 of the Clerk of this Court pursuant to the statute in such cases made and provided.

That thereafter and on the 20th day of February, 1915, the deposition of J. E. Ellis, a witness on behalf of the complainant, was taken before C. R. Triay, a Notary Public in and for Harris County in the State of Texas, in the City of Houston, and said deposition was duly filed in the office of the clerk of this Court on the 22nd day of February, 1915, pursuant to the statute in such cases made and provided.

Thereafter on the 27th day of March, 1915, defendants filed their answer to the amended bill of complaint.

Thereafter and on the 27th day of March, A. D. 1915, at a stated term of this Court begun and held in Houston, Texas, the issues joined in the above cause between the parties, came on to be heard before this Court, the plaintiff being represented by J. V. Meek, Esq., of Houston, Texas, its Solicitor, and Messrs, Theodore Kronshage, Jr., and J. W. McMillan, all of Milwaukee, of counsel, and the defendant by Jesse Andrews, Esq., and W. H. Walne, their attorneys; and upon the hearing of the issues in said cause, the attorneys for the plaintiff in order to establish, maintain and prove the allegations of their said bill offered the testimony of EMIL A. BIELFELD, by deposition De Bene Esse, as follows:

I am 59 years old and am manager of the bottling department of the Joseph Schlitz Brewing Company. I have been with the company 35 years. My duties as manager of the bottling department is to supervise the sales of beer, the purchase of bottles and such like, and supervising the advertising. The practical manager of the manufacturing department of our brewery has at all times been very careful to select only the choicest grade of barley and the finest grade of hops, and to have the most advanced methods for cooling beer dur-

ing the process of fermentation and the storing of beer in great

56 ice-houses and refrigerators. At all times we have had experts in the brewery line who have studied in the most famous academies of Europe and who have been in the employ of some of the largest breweries in Bohemia and in Copenhagen, Denmark. The quality and purity of our beer has been the subject of our advertising to a large extent. The copy of statement and declaration, trade mark No. 90,587, registered March 4, 1913, being a globe with the word "Schlitz" printed on a belt surrounding a globe, is a reproduction of a trade mark which we employ and use upon our labels, letter-heads, signs, showcards, souvenirs, etc. This trade-mark was adopted by our company as far back as 1888, I believe, and has been used since that time up to the present date.

(Paper referred to marked "Complainant's Exhibit A".)

The document you now hand me is a copy of a statement, declaration and photo lithographic copy of a trade mark granted our brewery by the United States Patent Office No. 26,385, and registered April 9th, 1895, and filed for registration on February 16th, of that year. This design for a label has been employed on all our bottled beer ever since April of 1895.

(Paper marked "Complainant's Exhibit B".)

The document you now hand me is a copy of the statement and declaration and a photo lithographic copy of a trade mark allowed by the United States Patent Office No. 52,011, registered May 1st, 1906, upon application filed August 4th, 1905. This is a device used by the Joseph Schlitz Brewing Company as a trade mark and label upon its larger beer ever since the early part of 1894.

(Document marked "Complainant's Exhibit C".)

57 The label which you show me in the shape of a parallelogram, having the words "Schlitz" in fancy script across the body of the label on an angle upward towards the right, a paraph or shading underneath that word: and in block lettering across the bottom of the label, in white, the words, "The Beer that made Milwaukee Famous"; the picture of a globe in blue coloring and a white line about one-eight of an inch from the outer edges of the whole thereof; all appearing upon a field of brown, is a badge of identification of 90% of the bottled beer which we have put upon the market. There is one brand of beer, the pale, that has a label of the same design but with a gold background. But practically none of this goes into Texas. There might have been one or two shipments.

The size of the label varies according to the size of the bottle, a quart bottle carrying a larger sized label than a pint bottle. Both labels are identical as to arrangement, color and devices thereon, except as to size. These labels have been used by us ever since the year 1894.

(Labels referred to marked "Complainant's Exhibit D and E".)

In the year 1894 when our company started to use solid body colored labels no other brewers, to my knowledge, were using a similar label. The solid body color of our label was quite an innovation, all labels of other brewers generally showing a white background with colored imprint. (And the following statement was admitted over the objection of defendant's counsel, and exception saved.)

The unusual coloring of our label was brought to my attention on a number of occasions by saloon men and through our agents who joked about the appearance of the label. It was so different from the usual bottled beer label that they called it a bay rum label because it resembled some bay rum that was being sold in the drug stores which had a label with a solid body color. The unusualness of the
58 label was noticed because it was our intention to put upon the market an unusual label when we selected this design, being quite aware that the manner of printing the label was entirely out of the ordinary, most brewer's labels being printed on backgrounds of white. In choosing this dark body color and white lettering and the blue figure on the label, it was the purpose of the Joseph Schlitz Brewing Company to put upon our product an unusual and distinguished label. This label has been used without interruption continually since 1894 to the present day.

The export beer of the Joseph Schlitz Brewing Company which bears a brown label with the white lettering and the blue picture, is put up in brown bottles and always has been with an exception of probably two or three percent. In years gone by we occasionally made an exception when the white bottle was insisted upon for the reason that the preference of the American public was in favor of white or light glass bottles. Since 1911 no bottle of export beer has gone out other than in a brown bottle.

During the last six years, 1906-1912, we have put up and sold about 350,000,000 of bottles which were distributed over the United States and foreign countries. Outside of English speaking countries we shipped beer to Central and South America, to Japan, China, India, also to Italy, to Costa Rica, Cuba, Equador, Honduras, Spanish Honduras, Nicaragua, Mexico, Panama, Porto Rico and San Domingo. All the beer that goes into those localities is put up in a brown bottle bearing a brown label. All these bottles have been sealed with a brown cork bearing a reproduction of the globe trade mark in blue coloring printed on the tin of the crown for fifteen or twenty years.

In my employment I keep track of labels of other breweries that approximate or are made in similitude of our label. We instruct all of our traveling representatives to be on the lookout for infringing labels, and any label that closely resembles ours will be brought to the notice of one or the other very quickly or else be reported
59 to us by our wholesale dealers located in every section of the United States.

Mr. Andrews, of counsel for defendant: Beginning at question and answer 67 of this deposition, if your Honor please, there follows at this point a series of questions and answers which we object to as being entirely immaterial and irrelevant. The question is asked this witness about a label bearing the word "America,"—The witness is asked whether or not that label has been called to his attention, and he is later asked what was done by him when the label was brought to his attention, and he testified later that the use of the label was stopped. We submit that this is entirely without any relevancy so far as this suit is concerned. It is a label made by another brewery, a third party with which these defendants have no connection, and a label of which this defendant probably never heard before. These depositions were taken and the action of the owner of that label in consenting to the abandonment of the use of it, or the action of the court, if such action was obtained, although the record does not show, as compelling the abandonment of it, entirely immaterial to this case.

Mr. McMillan: The purpose is merely to show that the complainant has in every instance where the use of a brown label came to his attention, taken immediate steps to protect his right in the use of that brown label, and the questions which are asked about the labels and which the witness is directed to, are a number of cases where the complainant has stopped the use of the brown label, and maintained its exclusive right to use the brown label with white lettering and the small blue feature on it.

It also tends to establish the fact that the complainant has been engaged exclusively in the use of the label of a brown body coloring with white script, and wherever there has been an attempt on the part of other breweries to manufacture a label of a brown body and white script, the complainant immediately took steps to have
60 the use of the brown body label stopped, and has for a number of years been in the exclusive enjoyment of it.

Court: The answer will be admitted subject to the objection.

Counsel for Defendant: We except to the ruling of the Court.

Mr. Andrews, for Defendant: The objection goes to all questions with reference to this label, which may be identified as the one that has the word "American" stamped on it.

The label to which you called my attention, of a brown color in the shape of a parallelogram with the word " American" in a script lettering slanting upward to the right a blue semi-circular picture draped with the American flag in colors on the left hand side of it, came to my notice probably twelve or fifteen years ago, and we instructed our attorneys to stop the use of this label by the brewery which issued the same. The use was stopped, the offending brewers surrendering or destroying the stock of labels they had on hand in the presence of Mr. Kronsbage.

(The label referred to marked Complainant's Exhibit F".)

During the time while we used the peculiar and characteristic label which has been the subject of my examination, there have been a number of imitations of our label which were used by other breweries brought to our attention. We immediately took those labels to our attorneys, asking them to defend our rights in the premises.

(Objection by the Defendant and exception.)

The label to which you now direct my attention, having a brown body color with the words "Peterson's Standard Beer" in white
61 lettering thereon, came to my notice and the result was that Mr. Peterson discontinued the use of that label and adopted a label of a different design.

(Objection by defendant and exception.)

(Label referred to marked "Complainant's Exhibit G".)

(The witness testified to the same effect, over objection by defendant's counsel and exception saved, in relation to a label having a brown body color with the word "Empire" in white script lettering on an angle upward toward the right and the picture of a blue shield with a red band across the same, bearing the words "A. C. Kuhfeld, Prop."; a label having a brown body color, white script lettering with a paraph underneath and blue figure, apparently a barrel head picture, on the left hand side of the label; a label, a paral-

lelogram, having the word "Scales" in white lettering upon a dark brown background, the picture of a horseshoe and spray of hops on the left hand side of the label; (Objection by defendant's counsel and exception saved); a label in the shape of a parallelogram having a dark or salmon or brownish background, the word "Bohemian" with paraph underneath and "Ekers' Lager" in white lettering upon the label; a label having a brownish solid body, with the word "Schultz" in white script lettering, with a paraph underneath, and a picture of a blue foot-ball on the left hand side of the label; a label with a brown body color, with the words "Special Brew" in white script lettering, with a circular disk on the left hand side of the label, and the picture of an Indian Chief, Pocatello, in blue thereon; all of which labels were marked "Complainant's Exhibits, H, I, J, K, L, and M." To each and all of which defendant's counsel objected and excepted to ruling of the Court admitting such testimony.

Question: I direct your attention, Mr. Bielfeld, to two photographs with the name "A Scovo Beyreuth" marked thereon, being
62 photographs of four bottles of beer marked with the word "Blitz Breu" in white script and a picture on the left hand side of the label with a bottle of Schlitz beer of the same size between each two of the pictures, and ask you what those pictures bring to your mind?

(Objection for reasons given as to admission of evidence in connection with "American" label overruled and exception saved by defendant).

Answer: Our attention to the striking similiarity of this bottle's label to our export label was drawn by a counselar report issued by the Department of Commerce, I believe, at Washington, to which *the* are subscribers. The result of our attention being called to this label was that we took up the matter of stopping the use of this label with our attorneys, and ascertained that it was a beer manufactured or brewed at Hamburg, which was largely sold in Syria, throughout Syria Beyreuth, Jerusalem and Damaskus. Our agents at Beyreuth were at the time quite heavy importers of our beer, having built up quite a trade on our brand of beer. The result, as I remember, was that the German authorities made the brewery at Hamburg stop the use of this label.

(Photographs marked "Complainant's Exhibit N. and O.")

From the time that we started to use our peculiar and distinctive label, with this solid body color and the white letters thereon and the blue picture, we have jealously guarded our property right in this particular trade mark, label and brand, and whenever any labels have been brought to our attention which we considered infringements we took action to stop the use of them.

During the years 1906 to 1912 we produced 350,000,000 bottles of beer, 90% of which bore this body colored label with the white script and the blue picture of a globe on the left hand side of the

label. During that period of time we shipped about fifty
63 million bottles of beer into the State of Texas, all of which was bottled in brown bottles bearing the same characteristic label. Our business in Texas is very extensive and in the six years that I have mentioned, was approximately one-seventh of the entire business of our bottling department in that particular line.

During the years from 1900 to 1912, inclusive, we expended about $2,100,000 for advertising our beer in newspapers and by means of signs and show-cards, and by magazines, printed matter, etc. During this period we did a large amount of advertising in the State of Texas through insertion in the daily papers in different cities in which we were represented by distributors. I have a memorandum here which shows the different towns in Texas in which the beer of our company has been advertised and which I now hand you.

(Memorandum marked "Complainant's Exhibit P". This statement shows the years in which the Joseph Schlitz Brewing Company advertised in some forty newspapers of the State of Texas.)

This statement does not indicate that we advertised in any particular paper and in a particular location during the entire time during the year. It indicates that the advertising campaign instituted during this year was generally of a duration from six to eight months with exception of 1911 and 1912 and also 1913 and 1914, which was continuous. Prior to these years it was of about six months' duration, during the spring and summer months.

"Question. Mr. Andrews: You don't mean that it appears 365 times in the year when you are advertising continuously; you mean that it appears at certain periodical times.

Answer: At certain periodical times, every week or sometimes twice a week in the earlier parts. In the beginning we had smaller space
64 and we would have to look that up closer, but I believe it was twice a week; and in the beginning it was every day; and then it was twice a week or three times a week; but of late years, probably from 1908 to 1910, it was once a week. We decided on much larger space, but not so frequently, feeling that it would have the same force by having a larger space once a week, and that it would be stronger than to have the same space divided up in three or four times, or insertions a week."

During the year- 1909 and 1910, when we were not using newspapers in Texas, we did advertising in the shape of large posters, 24 and 28 inch posters. I have a sheet here which shows a statement of the different towns in Texas in which such posters appeared during 1909 and 1910.

Memorandum marked "Complainant's Exhibit Q"; and shows the names of 36 cities in Texas in which poster advertising was done during the years 1909 and 1910 at the cost of $5,844.72.

In our general advertising I mentioned that we had advertised in magazines in general circulation in the United States. I have here a

list of magazines we advertised in since 1905, but we did some advertising in magazines prior to that time which we have not been able to compile in a hurry.

(Memorandum marked "Complainant's Exhibit R"; this shows 46 magazines of general circulation published in this country in which advertising was done beginning with the year 1905).

In addition to the newspaper, magazines and poster advertising, we put out large quantities of souvenirs in the shape of match boxes, glasses, trays and a number of other articles. These, however, have all been discontinued for a number of years, and we have no samples on hand. Outside of that we furnished all wholesale dealers with stationery, such as letter-heads, bill-heads and envelopes, on which there is an imprint of our building and our label. The customer's name is printed on this stationery upon which also appears an imprint of our trade mark and label. Of letter-heads like this sample, we have sent our during 1904 to 1912, 1,640,000. Of this letter-head we have sent out 1,665,000 during the same period. Of this letter-head, smaller size, we have sent out during the same period 800,000. Of this letterhead 600,000. Of this letter-head we have sent out during the same period 2,265,000. Of these envelopes 2,600,000. All this stationary to which I have referred, bears upon the face of it a facsimile copy in miniature of our brown body colored label with the white lettering upon it and the blue figure of a globe upon the left hand side of the label.

(Stationary marked "Complainant's Exhibits S, T, U, V, W, and X".)

Our representatives in Texas during all these years, numbering 60 to 75, probably 100, have been supplied with such stationery with their names imprinted upon it.

In addition to all this magazine, newspaper and poster advertising and the circulation of our letter-heads through our representatives, we have advertised our product in the shape of glass and metal signs. We supply each new customer we make with a certain quantity of these signs, figuring to supply him with sufficient to place one of these signs of each kind, if desired, in the retail stands of his customers, and thereafter furnish such kinds and quantities as asked for by the different dealers. If he gets a new customer he asks for more signs, signs that are subsequently issued. We all make it a point to send to the wholesale dealer a certain quantity of each new new sign. We judge at home of about the number of customers that the customer has and supply him accordingly; and in addition to that there are re-orders made from stock as the customers ask for additional signs of each kind. We strive to have one of these signs placed in every retail stand, hotels, saloons and bars.

Stipulation.

It is stipulated and agreed, that the annexed exhibits which are metal signs and glass and metal plaques and glass and wood frame pictures, may be marked by the reporter and shipped to the Clerk of the Court in a separate package from the deposition.

From 1900 to 1912 these various signs and framed glass pictures of bottles and advertising pictures and labels were used by our company in the advertising of its beer; and copies of these separate devices showing either the bottle as a whole or the label with a brown body color and the white lettering thereon, and the blue picture of a globe, were sent to our representatives in the State of Texas. Our representatives were requested to display them to the best advantage in all the public and private bars in the State and the saloons and hotels.

(Said several signs were marked respectively "Complainant's Exhibits Y-1, Y-2, Y-3, Y-4, Y-5, Y-6, Y-7 and Y-8").

I have already stated that from 1900 to 1912 we expended approximately $2,100,000 in keeping our brand of beer and our peculiar and distinctive label before the beer consuming public, and that when we adopted this peculiar and characteristic label we did so in order to feature and distinguish our beer from other beer brewed in the United States. I have also heretofore stated that we have been diligent in defending our title to this peculiar and characteristic label with its solid body coloring and with the lettering and the blue picture of a globe upon it and that we have kept this peculiar label and its position upon the bottle and the general appearance of our package before the public in our advertising.

67 Thirty-five years ago the entire output of our brewery was less than 100,000 barrels of beer and the bottled beer I do not think exceeded three or four thousand barrels. There has been a large increase in the amount of business done by our company since we adopted this peculiar label.

We distribute among foreign customers practically the same kind of advertising matter which we distribute to domestic customers. To the same extent it contains the facsimile of our label and the pictures of our bottle. We do not use a translated label in our foreign trade. We use the same label with the identical wording. The same arrangement and the same features and the same coloring. The trade mark is patented in all countries, or registered in all countries to which we send beer. I have already stated we have continued to use and have advertised the use of this peculiar label and its peculiar color combination right down to the present time and are still using it. And I have already stated that we have disposed of 350,000,000 bottles in the last six years and during the same period sold about 50,000,000 in the State of Texas.

I am acquainted with the defendant, the Huston Ice & Brewing Company. We had considerable dealings with them in the past.

They acted as distributors for our bottled beer in quite a number of towns, either directly or through agents or wholesale customers of theirs in Texas. I have a statement here showing a total shipment of 817 carloads and half carloads made through them during the period from 1900 to 1912, to a number of towns in Texas. This statement is taken from our records in the office of the Schlitz Brewing Company.

(Statement marked "Complainant's Exhibit Z". This statement shows 25 cities or towns in the State of Texas to which 817 carloads or half carloads of beer were shipped on account of the Houston Ice & Brewing Company).

All the beer shipped in the foregoing statement on account of the Houston Ice & Brewing Company was bottled in dark brown
68 bottles and labeled with our brown export label.

During these years I was acquainted with the package in which the Houston Ice & Brewing Company were distributing their product. It was a light bottle with a label that had a white background, with the words "Southern Select" on some of the labels.

The last shipment of beer which we made for the account of the Houston Ice & Brewing Company left in June, 1912. We have made no shipment to them since.

The label to which you call my attention, being a label rectangular in shape, having a brown solid body color, with the words "Southern Select" in white script on an angle upward toward the right, and "Houston Ice & Brewing Company" in white block lettering underneath, and having the picture of a magnolia flower upon a star, encircled with a green wreath, and the entire picture encircled with a blue band upon the left hand side of the label, came to my notice the first time to the best of my recollection in the early part of 1913. Our traveling representative for Texas sent in some of these or similar labels. We took the label to the office of our attorneys, Kronshage, Hannan & McMillan, and asked them to protect our interests as against the unfair competition of goods put up under such a label.

Question: What was your reason for consulting your attorneys about this label?

Mr. Andrews: We object to the question because it calls for a conclusion of the witness.

Court: The objection is sustained.

Complainant excepts to the ruling of the Court."

(The label testified to by the witness was marked Complainant's Exhibit AA").

69 When complainant's Exhibit AA was first brought to my attention we had been using our label with the brown body coloring and white lettering and picture of a blue globe for upwards of eighteen years, and it came to my attention after the Houston Ice & Brewing Company discontinued distributing our product. Previous to that time, as far as I have been advised, the Houston Ice & Brewing Company had been putting out its "Southern Select" beer with a

label that had a white background with the words "Southern Select" and some other design upon it.

The circular entitled "Beware of Label Imitations" was published in about 1900 because of the fact that imitations had been brought to our notice. I am not mistaken the reason for issuing it was the fact that the imitation of label of the American Brewing Company of New Orleans was brought to our notice about that time. We sent this circular to all lithographing establishments of bottlers of beer that we could find in the different publications that treated with the bottling of beer and also placed copies of this circular in all of our packages. It was printed in colors with a facsimile miniature of our label.

(Circular marked Complainant's Exhibit DD").

Cross-examination.

By Mr. Andrews: Of the 350,000,000 bottles shipped in the six years preceding 1912, and the 50,000,000 bottles shipped during that period into the State of Texas; I should say that about 70 to 80 per cent of the bottles shipped during that time were brown bottles to points outside of the State of Texas, and shipments to Texas, I should say that 90 per cent or more were brown bottles. After April, 1911, and during the balance of the year and the entire year of 1912, not a single light colored bottle was shipped, only brown bottles. I would say that about fifty per cent of the bottles that we shipped into Texas are returned to us. No particular effort is made
70 to have our distributors return as many Schlitz bottles as we send to Texas. It is hard for me to say what percentage of new bottles we use per box, it varies so much. Some times during the winter time there are practically no new bottles used. I do not know what becomes of bottles that are not returned. I presume they are sold.

We allow our distributors for empty bottles $4.20 per gross for the large bottles, and $3.00 per gross for the small bottles delivered in Milwaukee. To some older trade we allow as much as $4.80 per gross on large bottles and $3.60 per gross on small bottles. The allowance on bottles has changed during the years on account of the reduction of the price in new bottles. I do not know to what extent brewers in the different states depend upon empty bottles that have been used by other breweries. I understand they do purchase.

I am well acquainted with the Houston Ice & Brewing Company, and I know they use brown bottles. I presume that they bought up some of the bottles formerly used by the Schlitz Brewing Company.

Question: And what is true of the Houston Ice & Brewing Company is true of the other breweries in Texas, is it not?

Answer: Not to such an extent, because most of the breweries, large percentage of the breweries, have used a light bottle, light colored glass bottle, and not a brown bottle. It is only since we started our brown bottle campaign that some of the small brewers

have switched to the brown bottle. I should say that large brewers, like the Anheuser Busch, are using 95 per cent light bottles, Pabst Brewing Company 95 per cent light colored bottles, and those are the bottles generally bought up in Texas by breweries that use the bottles.

During the year 1914 we probably used 30 per cent of new bottles. If our business for 1914 was the same as 1913 there were about 30 per cent of our 1913 bottles that were not returned. Those bot-
71 tles were broken, lost, and sold for other purposes. I presume that some of them were sold for bottling beer. It is my understanding that part of the brown bottles that we send out are used by other breweries for the purpose of bottling beer. I presume that these bottles are bought by brewers and junk dealers and for all kinds of purposes.

We put the name "Schlitz" on bottles only for such markets in which we make no charge for the bottles when they are sent to the customers to insure the return of the bottle. For instance, the City of Milwaukee, up to very recently, it was not the usage to charge for the bottles to the retail trade and to avoid the large loss of those bottles we had our trade-mark blown into the bottle. I mean by that, that these bottles were to remain our property and for that reason we had the name blown in and at the foot, lettering "This Bottle is Never Sold". Bottles that we ship into the states, especially to such sections of the country from which no bottles can be returned on account of the high freight rates, we do not put our lettering on there to prevent the sale of those bottles. What we want to do is to encourage the sale of them in those localities. That applies to the country generally that is remote from the brewery. We could prevent the use of a Schlitz bottle by putting our name on it, but we would have no sale of beer then. It would make the beer too expensive in certain sections of the country. The dealer would not buy our beer. I presume, if he could not sell the bottles, and for that reason we encourage the sale of our bottles in those sections.

There is a very favorable rate for empty bottles but we do not blow "Schlitz" into the bottles that go to Texas because it would cause a mixup and partly because they could not sell the bottles.

Since 1911 we have advertised that the brown bottle is better adapted for beer than a light bottle. We have not used any light bottles since 1911 with one exception. We have a lot of light glass bottles for the Chicago market. The only thing in the
72 Chicago market, we do not put any labels on the beer. It is a cheap beer, unsteamed beer. The bottles bearing our trade-mark, we do not want to destroy them, that is all, and as they are broken up and lost in the trade, why, we substitute the brown bottle.

When I became connected with the brewery it was using brown bottles, but not exclusively. They also used a light green glass bottle, but we were not using more of the white bottles than of the brown bottles. We always had more brown bottles. Because we were aware of the fact,—it is an old fact, known to breweries years and years ago, authorities we quoted are of thirty years, forty years standing,

understood the light effect upon beer.—for that reason we tried to force the brown bottle without making a public campaign, a strong campaign.

When we used the two kind of bottles we did not use the same label. We had a pale brand, upon which, instead of having a dark-brown background, it had a gilt background, gold background. The design and makeup of the label was the same, the color entirely different. Our main purpose was to show a distinction of the brand. At the time we were using this gold background we were using this label with the brown background, export label, on the brown bottle. We established that in 1894. Prior to 1894 we had a special label for the pale beer which was put up in light bottles. Our brown bottles bore a white label with a white background and the figure of the globe in red, and about the center of the bottle. On the light bottles the label was of an entirely different design. It was a combination of blue and gilt lettering, entirely different. We never used this label on the brown bottle. In other words, prior to 1894, we had one label for the light green bottle and another for the brown bottle.

In 1894 we used the new design or label. We had never used the brown background before that time. We selected the brown color, if I recollect correctly, with the idea to show by the color of the label about the color of the beer which was put up under that label. So that we had for the dark brown or export color and brand of
73 beer the color which about approached the color of that label. We had the same design, the same scheme of label, or some design exactly for a dark brown beer similar in color to the imported heavy Bavarian beer, in which we had a very dark background. Then we had a beer somewhat lighter than our standard brand of export upon which we put a gold or gilt background to indicate the lighter beer.

It never entered our minds that the brown label would go well with the brown bottles. We would have taken the brown label if it had been altogether inartistic and out of harmony with the color of the bottles. I do not believe our present labels harmonize with our bottles at all. In fact, we have been criticized on that particular. Different colors would set off a label to much better effect on our brown bottles than our present style. The main thought was to show about the color of the beer reflected in the color of the label. When we adopted this label we adopted it in the shade in which it is now. There may have been changes, caused by the pure food laws of the different states, but as far as the permanent features of the label are concerned, the label has not been changed. So that when we adopted the label we gave it the form of a parallelogram with the name "Schlitz" written prominently across the face of it. Absolutely the arrangement and color scheme as it appears now. Our lithographers told us that practically they could find no other brewery using a brown label. That was foremost in our mind in deciding upon a solid coloring background. It is so long ago that I cannot remember anyone else that told us that. We selected the peculiar script and the

peculiar shape of the parallelogram and the characteristic arrangement which the label now has because it was so different from all other labels and to a large extent we relied on those things to distinguish our bottles of beer from that of other manufacturers.

There are any number of breweries that now use two colors of bottles in putting up their beer. They have different brands of beer and have different labels for those brands. They do not in all
74 cases use one label for light green bottles and another label for the brown bottles, but I cannot remember at present the name of the brewery which uses both kinds of bottles.

I cannot at this moment recall any advertisements in a magazine which showed the color of the label that we were using. Of course, the general run of the advertisements were in black print. It was not customary to use colored plates; only a few exceptions. I do not remember any advertisement that appeared in any magazine or newspaper calling attention to the fact that our label was a brown label, because it was not the proper medium to exploit the brown label. We did that through the posters and signs and showcards. It is difficult to give an impression to the reader as to the color of a label in reproducing it in black print in the magazines.

"Question: But whatever the reason, or lack of reason, attention was not called to that fact?

Answer: No, because that kind of advertising did not lend itself to the exploiting of the brown label."

The figures which I gave yesterday as to the cost of advertising and as to the number of letterheads, billheads and other such papers that were distributed, were figures and numbers which applied to the entire field, and only part of which applies to Texas.

The labels which you hand me concerning which I testified yesterday as infringements, seven are in the form of a parallelogram and two in the form of a rectangle, one of the two reading "Petersen's Standard Beer, Petersen Brewing Company, Grand Rapids, Michigan," and the other "Schultz Export, Pilsner Beer, Pendleton, Oregon", that is part of the lettering. If I recollect correctly the gentlemen of the Petersen Brewing Company came up here and settled in the office of our attorneys. I was not present and do not know how it was settled. I would not want to state from memory the manner in which the other controversies were disposed of. All that I can
75 recollect, the use of the labels was stopped. In some instances we obtained an injunction, in other instances by an arrangement between the attorneys agreeing to a stoppage of the use of those labels by the clients of the defendants in the case. I cannot say whether the Houston Ice & Brewing Company was using any brown bottles in 1913 or whether they ever used the white label referred to by me in my testimony on a brown bottle either prior to or subsequent to 1912. I do not recall ever seeing a bottle of the Houston Ice & Brewing Company's beer put up in a brown bottle and having a white label on it, but I do recall that we sued the Houston Ice & Brewing Company some years ago, in connection with a brew-

master and the secretary of a Turnverein for substituting bottles without labels, containing their product, brown bottles, for Schlitz beer. So I infer that they must have used the brown bottles

That suit was never brought to a conclusion because at that time the Houston Ice & Brewing Company were large customers of ours, handling 200 cars a year. We have not tried the suit. It was intended more as a notice to them not to sin further. I did not know that they filed an answer in that suit and denied vigorously all the claims that were made. It was never our intention to strongly prosecute that suit. It was simply a matter of notice to them to stop the procedure. We figured out that time they were good customers, of ours. 200 carload customers are very good customers, and we thought, knowing the character of Mr Hamilton, that would be a good strong notice. Other notice probably would not be well. That was the entire intention of the suit. There was no desire on the part of our company to press it, and we did not press it from the very beginning.

I infer that the Houston Ice & Brewing Company were using white labels on brown bottles, and soaking them off in the tubs, but I never saw anything of the kind myself because I had no chance to see it.

In 1911 we began to confine ourselves exclusively to the use of brown bottles. Prior to that time we were not using to exceed ten to fifteen per cent of light green bottles. I am not aware
76 that this caused the price of bottles to go up. But it did increase the number of brown bottles.

"Question: And made the brown bottles very much more easily available to these breweries, such as the ones in Texas, who are dependent for their supplies of bottles on bottles that have been used?

Answer: Hardly could take effect in such short time because we were about the only brewery that was sending brown bottles into that market.

We did not have any falling out with the Houston Ice & Brewing Company in 1912 when our business arrangement was discontinued.

Redirect examination.

By McMillan:

The paper that you hand me, which has pasted on it three labels, one with a brown background, the other with a gold background, and the other with a darkbrown background, and all with the peculiar white characteristic lettering, and the picture of a blue globe on the left hand side of the label, shows the different coloring of labels to which I referred in an answer to questions put to me by Mr. Andrews this morning. The largest percentage of our output has been put up under the label with the lighter brown body color. The gold label is used on occasional shipments of pale brand beer and the dark-brown label on a special brand of dark-brown beer. The ship-

ments to Texas as far as I know, are practically under the light brown label.

(Sheet containing three labels marked Complainant's "Exhibit EE").

The white label of the Houston Ice & Brewing Company to which I referred in my testimony yesterday in answer to questions
77 put to me by Mr. Andrews: Is this label marked "Houston Ice & Brewing Company, Southern Select", in the black lettering and the red encircled trade mark in the center.

(Label marked "Complainant's Exhibit FF").

Thereupon counsel for complainant offered in evidence the deposition of ARTHUR C. BAUMANN, who testified as follows:

I am 23 years old and have been employed in the advertising departments of the Joseph Schlitz Brewing Company very nearly eighteen years. I have charge of all the records of advertising in the various media newspapers, magazines, when we use them, posters, signs, etc. I am familiar with Complainant's Exhibit D, purporting to be a label of the Joseph Schlitz Brewing Company for its export beer. That label is put on every bottle of export, large sized bottles, that leaves the brewery. A somewhat smaller label is put on the smaller bottles.

The Joseph Schlitz Brewing Company advertises its beer in various ways; by newspaper advertising, illustrated comic weeklies and previous years in magazines; at one time on large billboards all over the country, and at all times by signs and showcards of various designs and descriptions, and many years back by the use of a large number of so-called novelties, many of them useful articles.

To a very large extent most of the advertising of the brewery referred directly to the label of which Exhibit D is a copy. Fully 90 per cent of it did, as nearly as I can judge, without consulting the records, absolutely.

I am familiar with the customs of the Joseph Schlitz Brewing Company in different states of the United States in a general way, in that I know where they are located, their names and business in general. I supervise the distribution to these customers of the advertising
signs. As a general rule, whenever we add a new sign to
78 our line, each wholesale dealer is supplied with a certain quantity judged by the amount of retail trade that he controls, and if that quantity is not enough and further supplies are needed they can be obtained by request to the brewery office or to our traveling representative. We are always ready to supply the signs free of charge.

The sign marked Exhibit Y, being a round plaque containing a facsimile, or a picture of a bottle of the Joseph Schlitz Brewing Company, with a brown body colored label and a blue figure at the left hand side, was used by the brewery about the year 1908, and was

distributed to the extent of 25,000 or more. Possibly, and very likely, a total of 40,000.

Exhibit Y-2, being a glass sign, metal back, bearing an enlarged colored reproduction of the label, Exhibit D, was used, as nearly as I can remember, in the year 1906, and about 5,000 were distributed.

Exhibit Y-3, being a framed glass sign, bearing a picture of the general trade mark of the company, the globe, and also a picture of the label, was used somewhere along in 1906 and about 7,000 of this sign were distributed.

Exhibit Y-4, containing a picture in colors of the Schlitz bottle, with the characteristic and distinctive label of the Schlitz Company, with a brown body color, was distributed by the brewery about 1902 or 1913. This was an earlier sign than the other and approximately 20,000 or more were distributed.

The standard (Exhibit Y-5), with a pic'ure in colors of the brown label, with solid brown body coloring and white lettering thereon, and a blue globe at the left, was first used along in 1906 and about
4,500 of these were distributed.

79 The standard (Y-6), bearing a facsimile picture copy in colors of the brown label of the Schlitz Brewing Company with the white lettering thereon and the blue picture of a globe on the left hand side was first used about November or December, 1911, and 3,500 of these have been distributed to date.

This framed glass (Exhibit Y-7), being a picture representation in colors of the product of the Joseph Schlitz Brewing Company in bottles with the characteristic brown body colored label, white script thereon, and blue figure at the left hand side was first used early in 1908 and about 18,000 of these signs have been distribueted to date.

Exhibit Y-8, a corner sign with an elec'rical equipment for lighting, bearing a picture in colors of the Joseph Schlitz Brewing Company's brown bottle with the brown colored label and the white script thereon, and the blue globe on the left hand side of the label was first used in 1908 and about 4,500 of these signs have been distributed to date.

All of the above signs (Y-1 to Y-8, both inclusive) were distributed to *her* customers indiscriminately, including our customers handling bottled beer in the State of Texas.

In my department I have a checking system which shows the exact amount of space used by each advertisement when it appears, the cost, total cost by the month, etc. At the end of the month the total amount of space is figured up and the price per line or inch, and check or voucher is issued in payment. We keep a file of all advertisements used. This printed matter concerning Schlitz beer and containing pictures in black and white of the Schlitz label are copies of advertisements which we ran in magazines and possibly
weekly papers, in about 1901 or 1902. It has been a rule to
80 run the same copy in different magazines and change in all papers when changing the text or copy; so that copies like this would be quite generally circulated at any one period and the same copy would appear in different magazines used by us at the same time.

(Advertising proofs marked "Complainant's Exhibit BB, BB-1, BB-2 and BB-3").

(Five folders, each containing several sheets, were marked "Complainant's Exhibit CC, CC-1, CC-2 CC-3, and CC-4).

Exhibits marked CC, CC-1, CC-2, CC-3 and CC-4 are copies of newspaper advertisements that appeared in the newepapers all over the country in the years 1906, 1907, 1908, 1911, 1912. During these years we conducted a general newspaper campaign. We furnished a printed proof of all advertisements and then an electrotype for each advertisement and instructions how to insert, and run; so that the same proof at a rule appeared in all the different papers used by us simultaneously.

During the years 1906, 1907 and 1908 we promptly directed our advertising to the purity of our product and the superior means of brewing it. During the years 1911 and 1912 we called particular attention to the type of bottle and the label and the picture of the bottle and label in our advertisements. In many of the earlier magazine advertisements we featured copies in black and white of our peculiar and distinctive label.

Exhibits CC and the following are copies of the advertisements that were published in this particular in Texas newspapers and those particular years mentioned in plaintiff's Exhibit P.

In this exhibit we have omitted the years 1909 and 1910 for the reason that we did no newspaper advertising during those years
81 but used large posters instead and these posters were distributed throughout the localities in which our product was sold.

Exhibit Q is a record of the poster advertising done by us in the State of Texas.

Cross-examination.

By Mr. Andrews:

During the years 1902, 1906, 1908 and 1911, our company distributed advertising signs other than the specimens which have been brought here. There were a number of such other media. During the year 1906 I could not say from memory what other sign or medium we used other than the sign made in brass which you have there showing the label.

Question: Well, now can you say from memory what other such signs you used in any one of the years from 1906 down to 1911?

Answer: We were using, for instance, a small tin hanger which shows a facsimile of a bottle.

Mr. McMillan: If you care to know about other advertisements—we have other advertisements that have been used from time to time. I can furnish you with a copy in black and white of a great number of signs.

In 1908 we used this picture of the bottle and I think also Exhibit No. Y. During that year we very likely got out some others, but I cannot state just what they were. I cannot remember positively that in that year we got out any advertising which did not show a picture of a bottle or a picture of the label. During some of the years in which these signs were used we possibly did get out signs which did not show the bottle with the brown label. I brought with me, to this hearing, those signs which show the brown label. I selected
82 them for that purpose, to show the label. In none of our newspaper advertising did we show the brown label because they were printed in black. It was not possible to show it. We may have run some colored pages in the magazines showing the brown label but I have not produced any here. I believe that in advertisements appearing in either magazines or newspapers, the fact that we used a brown label was referred to and I can find any of those advertisements before we close, I will supplement my testimony by pointing out which it is.

We spoke in our advertisement, both newspaper and magazine, of the superiority of our product, and called prominent attention to the name "Schlitz", and emphasized the care with which the beer was manufactured. We pointed out the purity which we claim for it and the superiority of the articles and ingredients of which it was made. We also showed the shape of the label in our advertisements. I presume that we did state that the product was to be known and recognized because it bore a brown label, but I cannot point out any advertisements now or recall any. I think there are among our exhibits a statement showing how much money we spent in Texas for advertising during any year, but that was confined to newspaper advertising only. This statement shows the amount paid for newspaper advertising in Texas from 1901 to December 31, 1912.

(Statement marked "Defendant's Exhibit 1." This statement shows that during those years the complainant expended $41,129.76 for newspaper advertising in Texas.)

The amounts appearing on this statement appear on our voucher records as having been paid to the papers. I am in a position to state that the amount of money shown on this statement was actually paid for advertising in Texas during that time.

The amounts shown on the statement for poster advertising done in Texas, are the amounts which were actually paid by us.
83 I have no data at hand to show how many of the signs offered in evidence were sent out to Texas during any one year.

Redirect examination.

By Mr. McMillan:

We are now keeping a detail record of the amount expended for distribution of signs, but that is of rather recent date. The record that we are now keeping dates back to 1911. Prior to that time we

did not keep any record of the distribution of our card advertising and souvenirs, and things of that sort; neither have I any way of ascertaining the proportionate amount expended in the advertising in the State of Texas through the circulation of magazines.

Thereupon the Court requested that oral testimony be taken and W. F. BLUM was called on behalf of the complainant, and testified as follows in answer to questions by Mr. Kronshage:

I am running the Temple Bottling Works, and also wholesale beer at Temple. I have been in business about fifteen years and have handled Schlitz bottle beer during all that time and am familiar with the general appearance of the package and the label upon the Schlitz package.

I first became familiar with the Southern Select beer bottled by the Houston Ice & Brewing Company in a brown bottle with a brown label, about two and one half years ago. My attention was called to it because it was like Schlitz, to me from a distance. That attracted my attention. After my attention was attracted to Southern Select beer bottled in a brown bottle with a brown label, I had a conversation with the representative of the Houston Ice & Brewing Company. That was about two years ago and the name of this representative was, I think, De Vallier.

84 This conversation took place in my office at Temple. I had represented the Houston Ice & Brewing Company before that, and they took the agency away from me, and he (De Vellier) said, "if you had tried to shove our beer instead of Schlitz you might have made lots of money and you could be with us yet". I do not remember anything else he said.

Question: "Did he say anything about the manner in which the Houston Ice & Brewing Company's beer was then being bottled and labeled?

Answer: Yes, sir; he said, "you know the new bottle beer we have out, and I said yes".

Question: What did he say about the new bottle beer?

Answer: Well, he said you can sell it for Schlitz just the same as anything else and you make more money by selling it.

Question: He said their new bottle beer put up in brown bottles and bearing a brown label, could be sold for Schlitz?

Answer: Yes, sir."

I am not myself engaged in retail business. I know personally that Southern Select beer, bottled by the Houston Ice & Brewing Company in brown bottles and having a brown label has been sold as and for Schlitz beer.

Cross-examination.

By Mr. Andrews:

Question: "You say that this Mr. DeVellier told you that if you would undertake to push the sale of Southern Select beer that you would get the agency back, and you told Mr. Kronshage—this

gentlemen—that was all the conversation that you and DeVellier had—that he told you if you would push the sale of Southern Select you could get the agency back?

Answer: No, sir; I had some other.

85 I am a wholesaler and do not sell to the men drinking the beer. He (DeVellier) told me if I sold Southern Select beer that I could put that off in the place of Schlitz. He told me that on account of the similarity in the labels I could sell Southern Select in place of Schlitz beer; knock the Schlitz out; he did not tell me I could fool the retailer; he thought he could handle it with the saloon men. He said if I would handle Southern Select I would gradually knock out Schlitz. I do not know what he meant by it. That is all I understood, just the remarks I gave you.

Question: When did you ever see Southern Select beer substituted for Schlitz beer?

Answer: I saw it a little over a year ago in Galveston; about a year ago, this month, when we had a liquor dealers' convention there. I did not see it anywhere else on that same date.

Question: Did you ever see it anywhere else in that time?

Answer: Yes, sir. I see it in Temple right now.

Question: Did you ever see any Southern Select beer in Temple sold in place of Schlitz?

Answer: Yes, sir; say a little over a week ago.

Question: How many other times before that?

Answer: I did not pay so much attention to it but I know it hurt my sale in Schlitz, that is the reason I know. I went to a saloon man and I asked him what was the reason you are not handling any Schlitz, and he answered, well you had some Southern Select and he gave the patron that and there is no kick in giving him that kind of beer, I made a little more money on it.

Question: He told you that a man called for Schlitz and he gave him Southern Select and there was no kick on it?

Answer: Yes, sir.

Question: Did he tell you that he fooled the man that he sold the beer to?

Answer: He did not say about fooling him.

86 Thereupon W. F. BUESING was called as a witness on behalf of the complainant, and testified as follows in answer to questions by Mr. Kronshage:

I am a wholesale and retail liquor dealer at San Denito, Texas. I handled San Antonio beer and the last two or three months Southern Select and Schlitz. I am familiar with the packages of the Houston Ice & Brewing Company, "Southern Select", and the Schlitz Brewing Company, both put up in a brown bottle and bearing a brown label with white script.

Question: What has been your experience in handling these two beers so bottled as to any confusion?

Answer: Well, I do not work behind the bar myself, but I have seen the bartender get mixed. Some man came in and asked for

Schlitz and he would give them Southern Select, and the next time he would call for Southern Select and may be he would give him Schlitz.

The bartender did not intend to do that. I instructed him at all times not do that, but to give the man whatever he called for. It was the result of a mistake on the part of my bartender. It has never occurred to me. I never work behind the bar.

I have seen that mistake in front of the bar. It has happened say just once in a while. I do not know how many times. I have seen it happen may be two or three times a week, but I have gotten after them so strong that he tries to watch it. I told him to keep his eyes open, and I said do not make this mistake because what I want you to do if a man asks for Schlitz is to give him Schlitz, and if he calls for Southern Select, give him Southern Select.

I recall an instance when a mistake occurred at a time when an employee of the Houston Ice & Brewing Company was present at my place. Mr. Bernd, the man that runs the ice house. He came in there and he buys the Southern Select all the time, and of course he is not very choice, and he had been coming in
87 there along for two and one half or three months, and Mr. Bernd came in and called for Southern Select and my bar tender handed him Schlitz. Mr. Bernd took it up and was just ready to take a drink and he noticed it, and he says: "Look here Dutch, I called for Southern Select." "Dutch" said, "Well, I intended to give you Southern Select, but I overlooked it. I have it right next to that", and he said "I handed you Schlitz", and Mr. Bernd said, "Well, that is nice enough but since you have opened it I will drink it."

My bar tender knew Mr. Bernd was an employe of the Houston Ice & Brewing Company, and knew that he always drank Southern Select beer. I do not remember any other instance of that kind happening on the same day.

Cross-examination.

By Mr. Andrews:

I was present when Mr. Bernd was drinking this beer. He noticed that he had not gotten what he ordered after he picked up the bottle. I do not know that he stopped to examine the bottle carefully to see or that he had any difficulty in seeing at once that he had not gotten what he ordered. He picked up the bottle and said, "Dutch, I ordered Southern Select."

Thereupon CLARENCE SELVAGE, called on behalf of the complainant, testified as follows in answer to questions by Mr. Kronshage:

I represent John T. Barbee & Company of Louisville, Kentucky, through the southern part of the State of Texas, and I make the retail and wholesale liquor trade quite generally in the capacity of traveling man for my employers. I am familiar with the package of Schlitz beer put up in brown bottles with a brown label and white script, and

and also familiar with the package of Southern Select beer put
88 up by the Houston Ice & Brewing Company in a brown bottle with brown labels.

I first got acquainted with Southern Select beer put up in brown bottles with a brown label some time in the early summer of 1913, in Bryan, In Brazos County, Texas.

The first time I saw it I was standing at the bar and they were unpacking several casks of beer and I looked at it casually and I asked "When did you put in Schlitz?" and they told me they had just gotten in a car, and I was little surprised and I said, "Well, I would like to have a bottle." They took it off the ice-box and kept looking at me smiling and I finally said, "What is the joke?" He said "how do you like it?" I said, "All-right, anything tastes good this hot weather." He laughed again, and I said, "What is it?" He said, "That is not Schlitz." I looked at the bottle and said, "What is it, if it is not Schlitz?" He said, "Southern Select". I said, "That is a pretty good one." I did not recognize that it was Southern Select until he told me it was.

I am very well acquainted with Mr. Autrey of the Houston Ice & Brewing Company. Am on friendly terms with him. A short time after this occurrence in Brazos County, I had a conversation with Mr. Autrey concerning this label on the package of the Houston Ice & Brewing Company, Southern Select.

Well, I was just joking in the conversation. I came in here from Bryan and happened to meet Mr. Autrey in the Brazos Hotel bar, and in the conversation I spoke of seeing this new package and he said, "What do you think of it?" I told him what I thought of it.

I told him I thought it was about the cleverest imitation I ever saw, and he said that it was not an imitation and that they had spent a great deal of money to get up that label, and I said, "Well, when Schlitz gets hold of you, you will not think so." I laughed and said "He will not prosecute you for imitation, he will prosecute you for counterfeit." That is about all there was to it.

89 Question: I wish you would tell the Court what it was about this package of Southern Select put up in a brown bottle with a brown label that deceived you?

Answer: Well, I do not know. It was the general appearance, I imagine. I did not take any particular note about it at all; just the similarity.

Question: Can you make it a little more clear in our mind what caused you to be deceived on having this bottle stand before you and believing it was "Schlitz"?

Answer: Well, the label looked very much like, and the letters are shaded in the same manner, and it is very similar to Schlitz.

There has been discussion in the trade which has been quite general, as to the similarity that exists between the labels of the Schlitz Brewing Company as appearing upon its export beer and the package in which the Southern Select of the Houston Ice & Brewing Company is put up in brown bottles.

Question: What is such discussion, state if you please?

Counsel for Defendant: The fact that there is discussion would not qualify the witness to state as to this repetition. The witness can only state, if it was prepared to say, upon his oath, that he knew what the reputation was, and until he is prepared to state that, he is not prepared to state what it is or what the discussion was.

The objection is sustained.

Plaintiff excepts to the ruling of the court.

Cross-examination.

By Mr. Andrews:

As far as my knowledge goes the Schlitz people learned of my experience at Bryan through someone overhearing a conversation at the Brazos Hotel. That is the only way that I know that
90 they could have learned it. I mean to say, that I did not know that the Schlitz people knew of this until the Marshall summoned me. I never had any conversation in that particular, with anybody representing the Schlitz Company until the Marshall summoned me. I discussed it around the hotel and it was discussed with others besides Mr. Autrey. With whom, I cannot recall. I do not think I told Mr. Swendson. (Representative of Schlitz Brewing Company.) But I would not be positive. You see that was two years ago and I cannot remember. Mr. Swendson and I are pretty good friends and the Marshall summoned me day before yesterday. I saw Mr. Swendson the evening before the Marshall served me, but I did not tell him about the occurrence at Bryan. I stop at the same hotel that Mr. Swendson stops at in Houston and had been stopping there for a number of years. I know what business Mr. Swendson was in but I am very positive I did not tell him about this occurrence at Bryan.

I have no difficulty in recognizing the "Southern Select" label which you hand me. I have no difficulty because I can read. But this is not the label they (Houston Ice & Brewing Company) formerly had. That is not like the same. I do not think that I would have trouble in recognizing that label as not being Schlitz beer if I looked at it. The label that deceived me I am positive had a different "S". I cannot tell whether I had ever been deceived by the label which you handed me. I have not been deceived as far as I know by this label.

I have heard of a specific instance where some one was deceived by this label recently at Humble. I imagine it is this label because it has been recently. I only have general knowledge.

Question: How did you hear about this substitution at Humble?

Answer: A saloon man up there day before yesterday, he asked
91 me if there was a case on here between the Schlitz people and the "Magnolia" Brewery, or the Houston Ice & Brewing Company, and I told him yes, and he related a little incident that happened up there.

Redirect examination.

By Mr. Kronshage.

Question: What was this incident?
Counsel for the Defendant: I object to that. It is purely hearsay and we have not the witness here.
Court: The objection is sustained.
Plaintiff excepts to the ruling of the court.
Question: You say that you would have absolutely no difficulty in recognizing that as a Southern Select label? Do I understand your answer to be as broad as that?
Answer: Well, if I read the label, I would not. I would know it was a Southern Select label.
Question: If you stopped to read it?
Answer: Yes, sir; or looked at it very closely.
Question: What would your answer be as to whether or not you would have any difficulty in determining whether this was a Southern Select label, if you had a bottle of beer bearing that label in the ordinary way that beer is drank at the bar, in the usual way?
Counsel for defendant: We object to that as a conclusion and opinion of the witness.
Court: The objection is sustained.
Plaintiff excepts to the ruling of the court.

92 On cross examination I referred to an instance where persons had confused the two beers and that was when Mr. Anderson called for beer at the Macatee Hotel bar, but I can only tell what Mr. Anderson told me.

Examination by the Court.

I am a traveling man handling nothing but whiskey. I do not handle beer.
Question: Do you know whether or not all beer practically is put up in brown bottles similar to the ones you see in front of you, one Schlitz and the others Select?
Answer: No, not all.
Question: What percentage of it?
Answer: I am told that the beer that has the largest sale is put up in white bottles.

Thereupon FRANK WILLIAMSON, called on behalf of the complainant, testified as follows in answer to questions by Mr. McMillan:

I live in Houston, Texas, and was last employed as bartender in Brownsville, Texas, by C. C. Consedine, at the "Office Bar".
I am familiar with the package of beer put up by the Houston Ice & Brewing Company as Southern Select put up in brown bottles with a brown label and white lettering, and that — up by Joseph Schlitz Brewing Company in a brown bottle with a brown label and white lettering.

I know of an instance of confusion of these packages in the City of Brownsville, at the "Bird Bar" conducted by Fernandez Brothers, on the 15th day of this month. I was down in Brownsville and in walking around I met a friend of mine and I said, "suppose you and I have a drink". He said "All right", and we went in and walked up to the bar and I said, "What will you have?" and he said, "What will you drink?" and I said "I am going to take a
93 bottle of Schlitz". And he said that he would go me, and I turned to the bartender and I said: "Give us two bottles of Schlitz", and he went to the icebox and drew out two bottles of Southern Select and my friend did not detect the difference until I called his attention to it. I said to my friend: "Does that taste like Schlitz beer? I had drank part of mine and he had drank part of his, and he said, "No, sir, not exactly, I do not know." He looked at the bottle, and he said, "No, it is not Schlitz". I then turned to the bartender, who was a Mexican or Spanish and spoke very little English, and I said: "Why do you give us this beer for Schlitz?" and he said "he no sabe", and I repeated it again, and I said: "You do this often"——

Objection by counsel.

Question: I direct your attention to a bottle of beer bearing a brown label, with the word "Export" on it, with the name of Schober's Ice & Brewing Company of San Antonio, Texas, and will ask you if you are familiar with the package put up by this company.
Answer: Yes, sir, I became familiar with that package at Brownsville, Texas. I handled it.

Counsel for Complainant: We offer in evidence the bottle of Schober beer above referred to, which is marked "Exhibit 4".

Question: What is the fact as to any instance of confusion of beer put up in this package with the Schober brown label, as to it being confused with Schlitz beer, have you known of any instance of that?

Counsel for defendant, Mr. Andrews: We object to that as immaterial in any issue in this case.

Court: Objection sustained.
94 Complainant excepts.
Court: I do not think defendant can be held responsible for any confusion other than their own bottle.

It is a fact that there is general comment among the trade as to the similarity between these two labels, the Schlitz label, and the label of the Houston Ice & Brewing Company of Southern Select in a brown bottle? I was employed at Brownsville, Texas, something over a year. At C. C. Considine's place our trade was mostly American trade, but when I changed places to the "Office Bar" that place had nearly half Spanish and Mexican and half American.

A great number of these people did not speak or understand the English language. One third of the trade there spoke the Mexican language or the Spanish language.

Cross-examination.

By Mr. Walne:

I have lived in Houston 12 years. My employment for the past two months is with the H. W. Sales Company, 649 Kress Building. I have had no communication with the Schlitz Brewing Company during the last two months. Had no employment from them whatever. I told Mr. Swendson I was going down in the Brownsville country and he is a friend of mine, and he said if you happen to see any substitution of this beer I would be glad if you would let me know about it.

I had made no previous arrangement with this bartender who perpetrated this substitution. The man I was with was sober. This was the first drink and the only one we had. I arranged for the Schlitz Brewing Company in connection with this matter for the attendance of Mr. McIntire, Mr. Buesing and Mr. Ellis. I did not arrange for the attendance of Mr. Breit. I do not know him.

I have spent none of my time in working up testimony in
95 this case. This substitution I spoke of at Brownsville is the only one I had actual experience in. When I went to Brownsville on this trip I did not go at Mr. Swendson's request. He did not pay my expenses but he told me he would refund any money that I was out. I do not exactly know how much he has refunded. When Mr. Ellis and I came to Houston Mr. Swendson paid our expense of transportation. I was down there at the time and brought Mr. Ellis up. I was not doing anything except representing H. W. Sales Company selling raincoats, and I came back here because I had folks here I wanted to visit. I was not paid to bring this man Mr. Ellis as witness in this case.

Mr. Swendson paid my railroad fare one time from Brownsville and he also paid my railroad fare from here up to Bryan. That was something like three weeks ago. My railroad fare was about $5.00 and my hotel bill $2.50. I went and saw Mr. Parker at Bryan. I interviewed him as a prospective witness in this case. Mr. Swendson paid me money when I went to Bryan and one time from Brownsville. I have also had some expense money given me once or twice before to pay my expenses, hotel bill and such as that. I do not remember when and where that was. The first time he paid my expenses for me was when Mr. Ellis and I came from Brownsville. That was before this incident of substitution took place. He paid me nothing before I bought my ticket. He paid my expenses from Brownsville. I lived at 506 Baker Avenue, Fairview Addition.

Redirect examination.

By Judge Meek:

I live with my brother. Mr. Swendson wired me to come and bring Mr. Ellis so that you could take his testimony in the case. I have been paid nothing to testify falsely in this case, and I have not been promised anything to give testimony in this case. I have
96 not been promised employment.

Thereupon C. C. McIntire was called on behalf of the complainant, and testified as follows in answer to questions by Judge Meek:

I have lived in Brownsville, Texas, about seven years off and on. My business is fisherman and gasoline engines. I am familiar with the beer put up by the Schlitz Brewing Company in a brown bottle with a brown label and also with the beer put up by the Houston Ice & Brewing Company in a brown bottle with a brown label.

I was at one time served with a bottle of Southern Select beer when Schlitz beer had been called for at Bird's Saloon, Brownsville, Texas. Frank Williamson called my attention to the fact that I was served Southern Select beer and Schlitz had been called for after I had tasted it, part of the glass. This was about three weeks ago—ten or fifteen days ago. I did not detect the difference in the bottle at all until my attention was called to it.

Question: At any other time did you ever go out to buy Schlitz beer, some half dozen bottles when you were sold something—a half a dozen Southern Select?

Answer: No. sir; I would not say that many bottles. I called for six bottles of beer, I called I believe for Schlitz beer, and I am not positive, but I think there was two bottles put in for Schlitz, but at the same time, I did not mention anything about it. I did not notice any particular difference in the label because I was in a hurry and the train was about ready to go and a friend of mine wanted the beer. This was three or four days before this time of Williamson I mentioned. It was the Friday before in Bird's Saloon.

Cross-examination.

By Mr. Andrews:

I am not positive that they put in two bottles of beer among the six that were not Schlitz, but I think they did, because natu-
97 rally in calling for a bottle of beer I would call for a certain brand and you naturally would think they had set out that particular brand. I am not positive. The six bottles were set up on the bar.

Question: Why do you think there were two that were different?

Answer: Well, this friend of mine, when he came back——

Question: That is all you know about it?

Answer: Yes, sir.

Question: You did not say that anything was written on them except "Schlitz"?

Answer: Certainly, I was not looking for that brand.

Question: You do not know about two that were not Schlitz?

Answer: No, Sir, and I know nothing about that except what somebody told me.

This substitution I spoke of occurred at no other time that I remember of. I may have drunk Southern Select or drunk Schlitz and called for the other brand for all I know.

I happened to run across Williamson when I was coming from a tin shop—I had a piece of work at the tin shop—and I was walking up the street and he said, "Hello Mac", and I said, "Hello Frank", and he said, "Will you have a bottle of beer"? and I said, "Sure, I would not mind", and I said, "Well, we will drop in here", and we stopped in there and he said, "What will you have?" and I said, "I will take beer", and I said, "Well, take whichever you prefer, I have no choice. He said, "Give me Schlitz", and they set two bottles on the bar and two glasses and I had drunk part of the bottle and Wilson looked up and said, "Do you detect any difference in that beer?" I said it did not taste exactly right. And he said, "Do you think this is Schlitz beer?" and I looked at the bottle and I said, "Why, it is not Schlitz beer." I saw the label on it. I had not noticed it particularly, because I would naturally think it was Schlitz
98 beer. As soon as I noticed it I saw and stated that it was not Schlitz beer.

Question: Did you have any difficulty at all, when you noticed it, in telling whether or not it was Schlitz beer?

Answer: There was a small difference.

Question: Could you tell at once that it was not Schlitz beer? I mean, look at the bottle and tell it was not Schlitz beer?

Answer: Yes, sir; sure thing.

Redirect examination.

By Judge Meek:

Question: After you read the label, then you saw and could tell it was not Schlitz?

Answer: It was easy enough after you had looked at it and read it.

Recross examination.

By Mr. Andrews:

Up to that time I had not paid any attention to the label. I heard Williamson order Schlitz beer. I do not think Williamson was intimately acquainted with the barkeeper. The boy did not speak English and Williamson said he did not speak Spanish.

Redirect examination.

By Judge Meek:

Question: When you call for Schlitz beer, do you generally recognize the bottle as Schlitz beer without taking time to read the label?

Answer: Well, you would recognize the brown bottle and the letters on it; that would be very easy to detect but it is confusing until you read it.

By the Court: What do you mean, it is very easy to tell
99 and at the same time it is confusing.

Answer: Well, if you read it. I can read, yes, sir. My business is fishing and running a gasoline engine. I fish at Point Isabell and down in Mexico, Lagoona Mavrie. Fishing has not been my principal business for as long as six or seven years. I was pumper at San Benito Land & Water Company about eleven months and I was down at the Life Saving Station about — months and the rest of the time I have been fishing.

The Mexican boy waited on us at Bird's Saloon. He could speak some English. He said "Yes, sir" and "No, sir."

Thereupon, R. L. AUTREY, called on behalf of the complainant, testified as follows, in answer to questions by Judge Meek:

We have had the following traveling salesmen in Texas within the last three years, as I now recall their names: S. J. Creagor, O. R. Ellsworth, B. F. Berry, J. J. Blasky (in Louisiana), Dan Devellier, who died recently, and Carlos Guerro, who wholesales for us but is not a traveling man; also a Mr. Thedford and a man by the name of Perez who keeps our warehouse at Mission.

Thereupon, GEORGE BARRINGER, called on behalf of the complainant, testified as follows in answer to questions by Mr. Kronshage:

My business is bartender and have been employed at the Interurban Buffet since the first of the month. Prior to that time I was employed at the Bender Hotel bar for about two months and ten days. I am familiar with the beer put up by the Schlitz Brewing Company in a brown bottle with a brown label and white lettering and also the beer of the Houston Ice & Brewing Company bearing a brown label with white lettering. Both of these beers were
100 carried by the Bender Bar.

Question: While you were employed at the Bender Bar, state whether when Schlitz beer was called for the Houston Ice & Brewing Company beer put up in a brown bottle and bearing a brown label with white lettering thereon was served or substituted?

Answer: Yes, sir, we sometimes substituted that beer.

Question: Was such substitution made with the labels on the bottles?

Answer: Yes, sir.

Question: Do you know whether or not the customers detected such substitution?

Answer: Well, I had several occasions, yes, sir, that we switched the bottle, and they said we had made a mistake, and of course we usually excused ourselves and said we had made a mistake and gave them a bottle of Schlitz instead.

We usually made the substitutions in a rush. Some customers detected the substitution and others failed to do so. I should judge that maybe two out of ten or two out of twenty detected that a substitution had been made. Usually a customer will not kick about a bartender's mistake, just kinder pass it up. I think about 10 per cent detected the substitution. When we made this substitution during the rush hours the porter brought the beer to me and I gave it to the customers. It is customary when a bartender goes to a new job to ascertain from the porter what the signs are, and therefore when I first went to work at the Bender Hotel Bar my rule was, that if I wanted two bottles of Southern Select and the man called for that I would say "Two Schlitz". If I wanted two bottles of Schlitz I would say "Two bottles of Schlitz"; and the porter then knew what to bring. If I wanted two bottles of Southern Select, I said "Two Schlitz" and if I said "Two bottles Schlitz" he would bring two Schlitz.

I don't remember the names of any customers that discovered the substitution. I do remember a customer of the Bender Bar who worked for Anderson's Pharmacy, but I do not remember
101 his name. He is a young man, perhaps 25 or 26 years old.

I remember the occasion when I substituted Southern Select on him when he called for Schlitz. That was about seven weeks or two months ago. I had served him beer before; he was one of my regular customers. On this one particular occasion this customer from the Anderson Drug Store discovered that he had been served with Southern Select instead of Schlitz beer.

Question: What did this customer say to you?

Answer: He turned the bottle around and said: "This is not Schlitz, what are you trying to do, slip me something?" and I said, "No, sir, I simply made a mistake, I beg your pardon, and I got two bottles of Schlitz for him right away.

There were four men in the party, two drank highballs and two drank Schlitz and I got two bottles of Schlitz and replaced the others. I think on previous occasions I served this gentleman who worked at Anderson's Drug Store Southern Select instead of Schlitz, but I cannot be positive about it.

Cross-examination.

By Mr. Andrews:

I do not know that Mr. Japhet owns the Interurban Bar or is interested in it. I never met Mr. Japhen until last Saturday night. I had no conversation with him about this case and I never talked with Mr. Swenson about it. I mean to tell the court that I never told

anybody at all any of the facts in regard to which I testified this morning before I came to the court and before I took the stand. I never talked with Mr. J. V. Meek. I do not know him. I never told anybody the testimony I was going to give in this case. I have previous to taking the stand told persons that I had substituted Southern Select for Schlitz beer. I told that to the world. I did not remember the names of any parties now. I did not tell
102 Mr. Swenson what I testified to on the stand. All I told him was substitution. Not he personally. They were standing at the bar. I did not tell him specially, I told eight or ten people. Mr. Swenson was in the party. When I said a while ago that I had not told Mr. Swenson I thought you meant a personal conversation.

When I made this substitution at the Bender Hotel Bar I was deceiving customers and I knew it. I did not think it was honest and I knew it was dishonest. When I tried to fool these customers at the Bender Hotel I just set the bottle on the counter and whether the label was in front or back I do not know. I was trying to deceive them and wanted to do everything to carry it out. I wanted to keep my job, I did. There were several porters while I was there. I know their first names. One there was Ed., one following named Gray and Jonas, and one there by the name of Wesley. The first porter was the one who gave me the inkling of what was done and the other porters followed suit. I did not ruffle the label when I handed it to a customer.

Examination by the Court: I got my instructions, the tip, from the porter and not — was there. I know their first names. One there was Ed. Besides Schlitz and Southern Select we also handled in bottles at the Bender Bar, Falstaff, Cook's Beer, Pilsner Beer, and "Blue Ribbon" made by Pabst.

Q. Suppose a customer came in and asked for a bottle of Budweiser and you did not have anything but Schlitz?

A. If I did not have anything else.

Q. He asked for Budweiser and you did not have anything in the icebox but Schlitz?

A. I would have to tell him I did not have any Budweiser.

Q. Why would you tell him that?

103 A. You cannot very well fool them on that.

Q. Suppose he came in and asked for Southern Select and you did not have anything else but Schlitz?

A. I guess I would try to fool them.

Thereupon WESTLEY JOHNSON was called on behalf of the complainant and testified as follows in answer to questions of Judge Meek:

Court: Have you been talking to anybody about this case since Saturday?

A. No, sir.

I am not working at present. Up to *the* near four days ago I worked at the Bender Hotel Bar for about two months. While I

was there Mr. Zeller was barkeeper and George ——. I would know his name if it was called. Yes, sir, it was Mr. Barringer. While I worked at the Bender Bar I was familiar with the different brands of beer that was handled. I was familiar with Schlitz bottle beer that is put up in brown bottles with a brown label and with Southern Select put in the same kind of bottle with a brown label.

While I was porter in the Bender Bar I did get a bottle of Southern Select and served it instead, when Schlitz beer had been called for. I once had instructions to do that. There was word and sign by which I knew when they wanted me to bring Southern Select for Schlitz. When a gentleman walked up to the bar and would say, give me a bottle of Schlitz and was not familiar with the label, he would say bring me a bottle, and that meant a bottle of Southern Select. That occurred as often as we could put it by. If two gentlemen walked in and called for Schlitz and we wanted to substitute Southern Select he would howl, bottle, the number, just howl bottle if he did not give me the sign of one finger for one beer and if he wanted Southern Select he let up two fingers. We substituted Southern Select for Schlitz just as often as we could get by with it, if they did not notice it, if they detected it, they would say, well, I asked for Schlitz, and sometimes the gentlemen would say, I will take it anyway, but I asked for Schlitz, but as often as we could get it over. We were able to get it over very often.

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I got my instructions when I first went there from Mr. Charlie Zellers, the head bartender and manager of the place. I quit work on Tuesday. I was born in Houston, Texas, and have been working around barrooms for ten years.

Cross-examination.

By Mr. Andrews:

If a customer came and asked for bottled Schlitz I would take a bottle of Southern Select if I thought that he was not acquainted with the label. If I though he was not acquainted with the label and could get by, I would bring him Southern Select and lots of times they would drink it, ask for Schlitz and drink Southern Select. I would not do anything with the label. I just set up the bottle like that. I would not remove the label. Lots of times come of the customers would call for Schlitz (I would) put Southern Select out and they would notice the label and then they would drink it, but they would say they called for Schlitz. Just about one man out of ten ever noticed the difference. The label would be out so they could see it.

I have no difficulty in telling a bottle of Southern Select because I have been using it so long and have been working with it and am well acquainted with the different labels.

Usually all labels were always on the bottle. I do not remember serving a bottle of Southern Select with the label off. Neither I nor the bartender kept our hand over the label so that it could not be seen. We just set the bottle up there.

Q. Do you remember any man that did get a look at the
105 label who drank it for Southern Select or Schlitz.

A. I remember men who drank the beer thinking they have drank Schlitz and recognized it after they have drank it half up. They would look at the label, and say I told you I wanted Schlitz and then it would be half drank up.

Q. How was it he did not notice it before that time?

A. He did not pay any attention to it until he drank it half up and saw it was Southern Select.

Q. Who got you to come here to testify?

A. The police came down there and arrested me to come here and gave me a summons and told me to come up here. I have not talked with anybody about it. In fact I asked the man to tell me about what did I do, and he said, nothing just come on up here. I have not talked to any gentlemen at all concerning the case of Schlitz and Southern Select. I have not seen any lawyer. No one has talked to me about what my testimony would be. I know nothing about it. I am simply telling you the truth about it. I do not know how this gentleman knew these facts. I know nothing about them. I have never at any time talked with them. I have not seen them until here in the courtroom.

I know Mr. Swenson when I see him. He was pointed out to me about two or three days ago. I was on the street and asked about Mr. Swenson because this boy told me that Mr. Swenson was in town and perhaps could get a job for me. I had just quit the saloon and was looking for a job. I was looking for another beer agent I knew by the name of Mr. Butt. I did not stop to talk with Mr. Swenson. I did not get close enough to ask him. Every time I saw him he was pretty busy and I saw he was busy. I did not know you had me up here for examination by the court.

Q. What beer did you carry?

A. Budweiser, Select, Blue Ribbon, Pabst, Schlitz, Falstaff, and Cooks.

Q. Suppose a man came and asked you for any one of the
106 beers you spoke of and you did not have anything but the Schlitz, what would you do?

A. If he came in and asked me for a bottle of Budweiser and we did not have anything but Schlitz I would tell him we did not have any Budweiser.

Q. Suppose a man came in and asked for Schlitz and you did not have Schlitz, what would you do?

A. If a man came in and asked for a bottle of Schlitz and we had Southern Select we would give him a bottle of Southern Select and take chances on getting by with it.

Sometimes men came in to the Bender Bar who are so drunk that they paid no attention, and if they asked for a bottle of Schlitz we could give him a bottle of Southern Select or anything. There is no trouble on imposing on a drunken man.

Recross-examination.

By Mr. Andrews:

Q. What do you bring a man when the bartender calls "Two Schlitz"?

A. The barkeeper does not call "Two Schlitz" unless the gentlemen had been drinking Schlitz and he knew he could get by with it and get him Southern Select. When a man was accustomed to drinking Schlitz beer, he told me to bring "Two Schlitz" and he would ask me to bring two Schlitz, but if the man would not be accustomed to drinking Schlitz and he thought he could get Southern Select by, he would say "Two Bottles." If he howled "Two Bottles Schlitz" I would bring Schlitz, but if he howled "Two Bottles," that means Southern Select. A man that asks for Schlitz, he gets Southern Select just the same.

Thereupon JOHN NELSON was called on behalf of the complainant, and testified as follows in answer to questions by Judge Meek:

I live at Temple, Texas, and am engaged in the saloon business as porter for W. F. Blum, Jr., a nephew to Mr. Blum who
107 testified the other day. I have been in the saloon business for 21 or 22 years and am familiar with the Schlitz beer put up in brown bottles with a brown label with white lettering on it and with the Houston Ice & Brewing Company beer put up in a brown bottle. I have known the latter beer for the last three months.

As porter in this Blum saloon I have for three or four months served a Southern Select beer put up in brown bottle with a brown label and white lettering to customers who asked for Schlitz beer. I do that very often, — do not make mistakes when they look at the label, but when they go by the bottles they are apt to make mistakes?

A. No, sir, the label.

Q. If they go by the bottle alone they are likely to make a mistake.

A. No, sir. There is a difference in the beer too. The Houston Ice & Brewing Company's beer is sweeter than the Schlitz.

It is pretty generally known that Schlitz beer is in a brown bottle. It is not generally known that the Southern Select beer is in brown bottles. Some of it is in white bottles. We have the white bottles now.

Q. Do you know any instance where the customer was deceived when he had an opportunity to get a glimpse at the bottle label?

A. Yes, sir. Very frequently I had. I say I make a mistake and thought it was Schlitz. That is what I say. I do not recall any instance where a customer was deceived who had looked at the label on the bottle. I do not know.

Q. Why was it that you could not recall an instance where the customer had been deceived who had a chance to look at the label. I will ask you if that was not because he had not an opportunity to look at the label?

A. In handling the beer for Schlitz the waiter a great deal of

the times washed the labels off and then, every day. Some customers have detected the substitution after looking closely at the
108 label. I make a mistake sometimes in giving them these bottles. I grab in there and give it through mistake.

I make a mistake myself because the bottles look just alike, and I cannot tell the difference in a rush.

We make so many mistakes that we now order white bottles or Southern Select and are handling that.

Cross-examination.

By Mr. Andrews:

If I am in a rush I would have to look at the label to see whether it is Schlitz or Southern Select. If I did not pay attention I might make a mistake. I would not be mistaken if I looked at it without being in a rush. If I look at it with any degree of care I would not be mistaken.

Q. You mean that you have trouble telling these beers apart if you look at them?

A. In a rush there is trouble to tell, in a rush.

Q. Take a customer, for instance, where a customer has a chance to see the label at all, does he make any mistake?

A. Sometimes they drink it and some say nothing and some kick and send it back and say I ordered Schlitz and some drink it up and kick afterwards and say I thought this was Schlitz.

Q. How do they find out it is not Schlitz?

A. They read the label.

If a customer looks at the label I am not able to get Southern Select by for Schlitz. They make a mistake by not looking at the label.

Q. You mean then when you say that they do you could not tell from the top whether it was Schlitz or Southern Select. I would have to look very closely to tell whether it was Schlitz or Southern Select and in a rush the ordinary customer could not tell this unless he looked at the label. Sometimes the label was washed off.

Q. I understood you to say when they are washed off, they if a man calls for a bottle of Schlitz you give him a bottle of
109 Southern Select with a label washed off.

A. No, sir. They sometimes wash off in the water and the only way you can tell whether it is Schlitz or Southern Select is to look at the top.

Redirect examination.

By Judge Meek:

I have handled Schlitz beer for the 20 or 22 years I have been in the saloon business and it has been sold in brown bottles with a brown label with white letters. We have been handling Southern Select about three or four months.

Q. Mr. Andrews asked you, had any one been fooled when they had an opportunity to see the label. I did not quite catch your answer, what did you mean by that—when a person took it and could read he could then tell the difference?

A. He could read it and tell the difference.

Q. That is the only way to tell then, is to read what is on it?

A. Some can not read, then they do not know what they are getting.

Recross-examination.

By Mr. Andrews:

Q. If they cannot read, they do not know whether that [they] are getting Schlitz?

A. They do not know whether they are getting Southern Select or Schlitz, both labels are the same.

Thereupon, J. R. CALLAHAN was called on behalf of the complainant, and testified as follows in answer to question by Judge Meek:—

I live in Beaumont, and am in the wholesale and retail 110 liquor business. I handle Schlitz.

I first saw Southern Select beer put up in brown bottles with a brown label and white lettering on the Trades' Excursion out of Beaumont the latter part of August or the first of September, 1913. Once or twice each year the Chamber of Commerce get up what is known as Trades' Excursion and it is customary for each brewery to donate casks of beer, and on this particular occasion I sent two casks of Schlitz, one of which was charged to the Excursion and the other which I donated. The excursion left Beaumont about 10 o'clock. About 11 o'clock a fellow came back to me on the train and asked me what kind of beer that was, what was the matter with the Schlitz. I told him there was nothing the matter, that I knew of, and went on talking to another party whom I was talking to. Shortly after that another party came back and said, "You have some bum beer—Schlitz—on the train. I got up and went to the baggage car and asked the porter to give a bottle of Schlitz and he handed me a bottle of Southern Select. I looked at it and told him that was not Schlitz. He looked at it and said "Boss I thought it was Schlitz." I told him he had not opened the Schlitz up and he went away and opened up a cask of Schlitz. That was the first time I ever saw Southern Select in brown bottles and brown labels.

That while in Houston, en route for Galveston, I had a number of friends with me, and I met Mr. Swenson and he asked me to go down to the Brazos Hotel and have supper. All the folks said they had rather have some oysters. He said, "Well we can go around to Lang's Oyster Parlor, and we went there and ordered all kinds of oysters and ordered seven bottles of Schlitz. There were eight in the crowd but one of the ladies did not want so we ordered seven bottles of Schlitz, and they brought in seven bottles of Southern Select.

None of that was drank but it was detected. It was noticed as soon as they brought it in. Some of the crowd noticed it as soon as it was put on the table and asked the waiter about it. Mr. Swenson and J. T. Booth and wife, myself and wife, my little girl and I think one other lady were in the party.

111 Thereupon C. L. FISHER was called on behalf of the complainant and testified as follows in answer to questions by Judge Meek:

I live in Beaumont, Texas, sixteen years and am in the saloon business pretty nearly two years for myself. I have tended bar ever since I have been there. I am acquainted with a gentleman by the name of Pete Harlan, who up to about a year ago had charge of a warehouse of the Houston Ice & Brewing Company. A man by the name of Martin has charge of it now. Until Mr. Harlan quit he had charge of the warehouse and was agent for the Houston Ice & Brg. Co. He visited the saloons and took orders for beer and sold beer. During the time Mr. Harlan had charge there was no other representative in Beaumont of the Houston Ice & Brg. Co.

Q. What conversation, if any, occurred between you and Mr. Harlan at any time while you were handling this Southern Select with reference to its resembling any other beer?.

A. Well, I used to sometimes sell it for Schlitz.

Q. Did you ever have any conversation with Mr. Harlan in which there was any compensation suggested?

A. Well, he told me, he said, there is no use in using Schlitz, you can sell Southern Select for the same purpose, and he said the label and everything is alike. I never had Schlitz in my house at all.

Q. What has been the custom in your place of business, while you were running the saloon, when a man came in the saloon and asked for a bottle of Schlitz, what was he served with?

A. I gave him Southern Select.

Q. Did you do that continuously?

A. I have done it ever since I have been in business.

Q. Were you able to sell Southern Select beer put up in a brown bottle with a brown label successfully as Schlitz beer?

A. Well, I got by pretty regularly with it, once in a while some one mentioned it.

112 Q. In serving beer, when a man comes and calls for a bottle of beer, how do you serve it to him? Would you pour it out or in?

A. Yes, sir, pour it out and set it on the counter and let him pour it out himself.

Cross-examination.

By Mr. Andrews:

Q. If a man asked for a bottle of Budweiser what would you give him?

A. I would give him Budweiser.

Q. If he asked for any beer that you would not handle what would you give him?

A. Well, I would tell him I did not have it.

Q. Suppose he asked for a bottle of Blue Ribbon beer and you were not handling that kind. Would you let him go out and miss the sale or did you give him beer that you had that was equally good?

A. No, sir, I would tell him I did not have it because Blue Ribbon beer and all other beer is put up in different packages.

Yes, sir, I am pretty fond of beer. I had rather had keg beer if I can get it. I drink Southern Select. I cannot drink Schlitz beer because it makes me sick. I do not like the taste of it.

Q. These customers you spoke of to whom you gave the Southern Select beer, when they order Schlitz, do you know that they did not know that they got Southern Select?

A. Well, I set it out on the counter and it looked so much alike I think they did not know the difference. After a man takes two or three bottles he cannot very well tell the difference.

Q. I am talking about the time before that?

A. I do not know how many he had before he came into my place. From my experience in the saloon business after a man takes four or five bottles he does not know what kind he is drinking.

113 Q. That is why you say you got by it in most cases?

A. I got by in—well, in some of that ways, yes sir, but in other ways. if a man did not exactly look at the label you would get by with it on him, that is the way I got by mostly.

Pete Harlan told me I could get by with this beer for Schlitz. That is what he told me, and I did. I was not handling Schlitz. I do not know exactly whether he told me that Southern-Select was a better beer.

I came over here this morning. Paul Escedine he asked me to come last night. He saw me at Sazerach Bar, the place I used to run in Beaumont. He did not offer me anything to come. He just told me to tell what difference between Schlitz beer and Southern Select. I paid my own railroad fare and I do not expect him to refund it.

Q. You're a pretty generous man to give your time and railroad fare?

A. I have not got anything but time. Mr. Harlan is no longer in the employ of the Houston Ice & Brg. Co. He is running a saloon over there.

Thereupon J. A. TAYLOR was called on behalf of the complainant and testified as follows in answer to questions put by Mr. Kronshage:

I live in Houston, and have had charge of the Anderson Soda Water Fountain located at 804 Main Street in the Carter Building for three years. I am familiar with the Schlitz beer sold in brown bottles with a brown label and white lettering and a blue picture on it and also the Houston Ice & Brewing Company beer called Southern Select put up in a brown bottle with a brown label and white lettering. I drink Schlitz beer once in a while. I remember an instance

when I was served with Southern Select beer at the Bender Bar when I had called for Schlitz.

Q. How did you detect that you were not served with Schlitz?

114 A. Well, I first tasted it, and did not think it tasted like Schlitz and I shoved it aside and said I ordered Schlitz, and they changed it for me and gave me Schlitz. The Southern Select was served to me with the label on. After I tasted the beer I noticed that the label was not Schlitz beer.

Q. Did you read the label at that time?

A. Well, it was not necessary to read it, I had read it before—I had read it to see it was Southern Select.

This happened at the Bender Bar about a month or three weeks ago. I do not know the barkeeper's name. They call him George. Yes, sir, I have heard him called George Barringer.

Another time I was served with Southern Select at a bar on the corner of Travis and Rusk Avenue. The label on the bottle served me was partly off. I had called for Schlitz. I tasted it first and I looked at the label and saw "Hous" and I told the fellow I was with I did not think that tasted like Schlitz and the fellow that was with me was drinking Budweiser and I said, "Give me a bottle of Budweiser," and I shoved it back and they gave me Budweiser. The label was partly off. I guess about an inch and a half or two inches were on there. I did not discover that I was being served with Southern Select instead of Schlitz until after I had tasted the beer and decided it did not taste like Schlitz beer and then I looked to be sure that it was not.

Cross-examination.

By Mr. Andrews:

At this last place I first asked for Schlitz; the second time I did not. I do not know that they had Schlitz there. They used to have it.

I have been patronizing the Bendar Bar for years, ever since I have been here. The occasion I spoke of is the only one of the kind that occurred there and this barkeeper George is the only one who ever attempted to do that.

115 Q. Did you have any difficulty in observing and seeing that it was not Schlitz beer after you detected a difference in the taste?

A. Well, to be sure I was right I looked at the bottle and it was not Schlitz.

Q. I ask you if you had any difficulty in seeing at once that it was not Schlitz beer after you noticed a difference in the taste of the beer?

A. Yes, sir; I noticed it was not Schlitz.

Q. When you glanced at the bottle, your attention having been called to it by a difference in the taste?

A. I did not glance at the bottle, I just tasted it and found that

it was not Schlitz and settled down.

Q. Then you looked at the label?

A. Yes, sir.

Q. Did you have any difficulty then in telling it was not Schlitz beer?

A. I saw the resemblance to it but I could read and tell it was not.

Q. When you looked at it you could tell it was not Schlitz beer?

A. Yes, sir.

Q. Did you not testify on direct examination that it was not necessary for you to look hard at the bottle in order to tell that it was not Schlitz?

A. I said it was difficult—not all the words, it had part of the label off. I was not fooled the second time. That is all the experience of this kind I have had.

Two or three days after the occurrence at the Bender Bar I saw Mr. Harrigan in the store and he asked me whether I remembered the circumstance. He asked me "Do you remember one night you came in the bar and ordered Schlitz and through mistake I gave you Southern Select?" And I said "Yes, sir, I remember it." That was the beginning and the end of the conversation. He sat around a while and got a Coca-Cola. It happened to be rush time with me. I did not know anything about this suit in court until Saturday.

The conversation I had with Barringer was three or four
116 days after I drank the beer and that is about three weeks ago. may be two weeks ago. I do not know whether he was still working at the hotel when I had this conversation with him.

Thereupon L. ANDERSON was called on behalf of the complainant, and testified as follows in answer to questions by Mr. Kronshage:

I live in Houston, Texas; am owner of the Brazos Hotel Bar and a part owner of the Brazos Hotel. I am familiar with the Schlitz package and I am also acquainted with the packages in which the Houston Ice & Brewing Company puts up its Southern Select beer. One is a light green colored bottle with a white label and the other is a brown bottle with brown label and white lettering. I carry Southern Select beer at the Brazos Bar put up in white bottles carrying a white label. I do not carry Southern Select at the Brazos Bar bottled in brown bottles. I also carry Schlitz beer.

Q. Have you ever confused the bottled Schlitz beer bottled in a brown bottle and carrying a brown label with the Southern Select beer put up in a brown bottle and carrying a brown label?

A. Yes, sir.

Q. Where did you confuse the two?

A. The first time I ever saw the new bottle of the Houston I was at the Macatee Bar. I had ordered a bottle of Southern Select beer and I was served a bottle of beer and I thought it was Schlitz, and I called the bartender's attention to it, and he said that is Southern Select, and then I examined it. I said, "You made a mistake, you served me Schlitz beer and I ordered Southern Select." I then read the label and saw it was Southern Select. I had to read the label in order to tell the difference.

117 Cross-examination.

By Mr. Andrews:

That was the first time that I had ever seen Southern Select in the new bottles. I did not know it was packed in brown bottles; and my impression was that it was Schlitz. I detected the difference when I read the label.

J. T. BOOTH, called on behalf of the complainant, testified as follows in answer to questions by Judge Meek:

I have lived in Beaumont, Texas, about fourteen years and am in the metal, tin sheet, iron and cornice work. I remember being in Houston with a party of seven or eight at Lang's Oyster Parlor a little longer than a year ago. Mr. Callahan, Mr. Swenson and myself and ladies were in the party.

Schlitz beer was ordered by us and Southern Select was served. I do not remember who in the party detected the difference and called attention to it. I did not pay any attention to it. In fact I thought we had Schlitz when it was put on the table until I heard some remark made about not having the beer that we ordered. I examined the label and saw it was not Schlitz.

Q. Did you have to read the label to tell the difference?
A. Well, I would, not being familiar with it.
Q. And you did read it on that occasion?
A. Yes, sir.

Cross-examination.

By Mr. Andrews:

I drink beer occasionally. Mr. Callahan was present and also Mr. Swenson, the agent of the Schlitz people. I paid no attention to the order or tray at all until this conversation came up.

118 Thereupon E. H. TOMLINSON was called on behalf of the complainant, and testified as follows in answer to questions by Judge Meek:

I live at Stafford, Fort Bend County, and am engaged in the general merchandise and saloon business. I have been running a saloon about seven or eight years and I handle some Southern Select beer and Schlitz beer.

During the fall of 1913 or the early part of 1914 there was an agent of the Houston Ice & Brewing Company who called upon me to get me to handle their beer. He came up there and introduced himself as Mr. Chester (Creagor) to the best of my knowledge, and claimed he was with the Houston Ice & Brg. Co. and was soliciting orders for beer, and he asked me what beer I had the best trade on and I told him "Schlitz." I have been handling Schlitz off and on for about twenty years. He told me that they were putting up beer in brown bottles with a brown label similar to the Schlitz label and I

could handle it right along with Schlitz. I did not agree with him and did not buy any of his brown bottled beer. I told him I had plenty of beer on hand right now and I di dnot do business that way. If a man called for a certain beer and if I did not have it, I told him I did not have it. That I had handled beer in black bottles lots of times on account of the drummers, and this would have made a pretty good substitute, but if a man came in and called for a bottle of beer, to set a black bottle of beer cut and deceive him, I told him that I did not like to do that. If a man came in and called for anything I did not have I told him so.

Q. What kind of package did you handle the Southern Select in?

A. At that time I handled it in a bottle like Blue Ribbon, a white bottle.

Q. What kind of a label?

A. White label.

119 Cross-examination.

By Mr. Andrews:

I handled some of the Southern Select last Fall in the brown bottle and brown label. I got some from Sugarland and I handled a little of it.

Q. Do you have any difficulty in telling it from Schlitz.

A. Well, you would have to look in the ice-box where you put it in the ice box, you would have to look at it. If you did not, you'd pick up Southern Select for Schlitz and my clerk did that two or three times, pick up Southern Select for Schlitz. My clerk did not discover he had made a mistake until I told him.

Q. How far had the matter gone?

A. Well, the beer had been set on the counter and the customer said, "Let it go." My clerk is a white man. I had no difficulty in distinguishing the beer myself except in the ice-box. I would have to turn it over and see whether it was Southern Select or Schlitz. I do not think any of my customers were deceived by it. There was no chance for them to be deceived in that way, because I would not allow that. Two or three of them remarked that it could be done easily, that when they did not look at it they might believe it was Schlitz, if *it* did not notice the label.

I talked about this party going there claiming to be with the Houston Ice & Brg. Co. with Mr. Japhet who I guess is distributing agent for the Schlitz Brg. Co. Before I came here as a witness the Schlitz people did not tell me they were objecting to the Southern Select beer carrying a label that was so much like theirs and that it interfered with the sale of the beer. I spoke to Mr. Japhet in his store. To the best of my knowledge the man claiming to be with the Houston Ice & Brg. Co. introduced himself as Mr. Chester and
120 talked about the business I had done with a former representative.

Thereupon W. Gusa was called on behalf of the complainant, and testified as follows in answer to questions by Judge Meek:

I reside at Bastrop, Texas, and am engaged in the saloon business. I handled Schlitz beer over the bar but I did not handle Southern Select put up in brown bottles with a brown label. My father is wholesaler for Southern Select. I handle Southern Select in white bottles bearing a white label. We handle the white label but not the brown label. We handle Schlitz in a brown bottle with a brown label. I have been in the saloon business all my life with my father.

Since the Houston Ice & Brg. Co. has been selling their Southern Select in brown bottles I have seen it confused with Schlitz beer in brown bottles with a brown label at the Rice Bar in Houston, Texas. This was November a year ago during the Houston Carnival. I saw two gentlemen walk up and ask for two bottles of Schlitz beer and the bartender reached down and got two bottles of Southern Select and as he took the bottles up he rubbed the labels off and I am positive it was Southern Select. I know it when I see it.

Thereupon THEO. KRONSHAGE, JR., was called on behalf of the complainant, and testified as follows:—

In 1893 our firm, which was then composed of Judge Tarrant and myself, was retained by the Joseph Schlitz Brg. Co. to co-operate with the American Fine Art Co. in getting up and drafting a new label for Schlitz bottled beer. Judge Tarrant and myself were at that time the regularly retained attorneys of the American Fine Art Company. Judge Tarrant and myself wrote to upward of 40 lithographing companies for samples of the different kinds of beer labels which were then being printed. We also corresponded with about one-half of all the breweries in the countries and asked them
121 for samples of the labels which they were using. We wrote to all the large breweries and in that way we accumulated between 2200 and 2300 different kinds of labels. I cannot at the present time state the exact number. This collection of labels was lost during the time when we had an action for infringement pending against the American Brewery Co. at New Orleans, and I have been unable to locate it since.

We also searched the reports of the Patent Office for trade marks and also for registered labels. Personally I took a trip to Washington, where, in connection with General R. C. Dyrenforth I made a thorough search of the trade mark labels for beer and also of all labels used on beer which has been registered. After our investigation had proceeded to some extent, the American Fine Arts Company prepared some labels with a body color, other than white, to which Mr. Wuesthoff, the then general manager of the Schlitz Brg. Co., and Mr. Bielfeld took kindly. The result of our search at that time was that we found no beer using a label which had a body color other than white. All the labels we accumulated had a white body color and the search I made in connection with General R. G. Dyrenforth, the former Commissioner of Patents, at Washington, disclosed that there were no labels or trade marks used as labels which had a solid body color other than white.

After we had reported the results of our search to Mr. Wuesthoff

and Mr. Bielfeld, the Joseph Schlitz Brg. Co. adopted three different labels with solid body colors.

One label with a solid body color, gold, which was placed upon a light bottle, and on a beer which was pale. It was a very fancy bottle and I am told that very little of it was sold. At that time the brewery was also putting up a beer which was known as dark beer, for which they adopted a label having a very dark chocolate brown body color. For the brewery's Export beer the label which is before this court with a brown body color was then adopted and this beer was put up in brown bottles at that time. The other labels, the one
122 with the gold body color and the dark chocolate brown body color differed from the label before the court, that is the Export label, only in the body color. The word "Schlitz" in ornamental white script, the general trade mark of the company, the globe in blue, the white marginal lines and the wording upon the label in white block letters were the same in all three of the labels.

After these labels had been adopted by the company we were instructed to take proceedings to have the same registered in the United States Patent Office as trade marks for beer brewed by the Schlitz Brewing Co. and bottled at the brewery.

Since the commencement of this action I have requested the Milwaukee Lithographing Company to furnish me with samples of some of the labels that have been printed for other customers, and they have furnished me with two books which contain samples of labels which they have made. I desire to offer these books in evidence as proof tending to show how easy it is to discriminate and differentiate between labels on bottled lager beer if a person has a desire to do so.

(Books marked "Complainant's Exhibit No. 7" and "Complainant's Exhibit No. 8").

There is one thing more I wish to say. There is one case of mistake or confusion between Schlitz bottled beer and Southern Select beer which happened to come to my attention on the last day of the argument before your Honor in June. Upon my return to Houston at about 7 o'clock in the evening I dropped into the Rice Hotel Bar and while standing there three men came up and stood beside me and I heard each one of them order a bottle of Schlitz beer. Within a few minutes after that I noticed that the man who was standing immediately on my left had before him a bottle of Southern Select. I then looked at the other two bottles and noticed that the other bottles were Schlitz. The men were engaged in conversation. As I remember it they were discussing the Mexican situation, and I
123 stood there watching them drink their beer. After begging their pardon for the intrusion, I asked them what beer they were drinking, addressing my remarks to the man immediately at my left. He said, "That is Schlitz beer." I said, "The package is very striking. That is a very peculiar label;" and I shoved the bottle that he had before him along the bar and he agreed with my statement. I said the label says on it "Southern Select"

and then he evidently read the label. All three of the men expressed some surprise and handed the bottle around. I thereupon introduced myself as attorney for the Schlitz Brewing Co., and told them that I had just come from arguing a motion for temporary injunction before the Federal Court and that I would like them to serve as witnesses. I asked them whether they would give me their names. One of the gentlemen, who was a rather elderly man, said that he lived in Alabama and that it would not do me any good to get his name. I suggested that I would take his deposition. He said "We are busy men, and you can get plenty of witnesses anywhere;" and they walked away. That was one occasion of that kind that has come to my notice and I thought it my duty to my client to relate it here in Court.

Cross-examination.

By Mr. Andrews:

I was at the Rice Hotel four or five days. I had heard from our agents that there were a great many substitutions going on but I made no effort myself personally to affirm or disprove them then by going into the Rice Hotel Bar. I have never made a practice of that in my practice of law. I dropped in the Rice Hotel Bar several times and I did not stay in there long except on one occasion when Mr. Swenson was with me. It is not true that I made a point to observe rather closely in the Rice Hotel Bar to see if anything of the kind was going on. The first time I was here the Traveling Men's Protective Association had a meeting with headquarters at the Rice Hotel. This was the first time I dropped in there and I found a large number of Southern Select bottles standing on the bar, thirty or forty of them. I think I noticed two or three bottles of
124 Schlitz, a few bottles of Budweiser, and a few bottles of Blatz, But there were more Budweiser than Schlitz or Blatz. At another time I stood there with Mr. Swenson and heard two men further down the bar order some Schlitz, although it was not very distinct. I stood there for a while and I asked Mr. Swenson to follow them up and make inquiry whether or not they had ordered Schlitz, but I had no conversation with them myself.

I am positive on the occasion that occurred upon my return from Galveston, that the men ordered Schlitz. They were standing right next to me for a few minutes. I did not pay any attention to what they were being served; but my eyes happened to fall on the Southern Select bottle that the man was drinking next to me, and I noticed that it was Southern Select, and then I noticed that the other two bottles were Schlitz. I say that I am positive that I heard them order Schlitz and that is the reason I asked the man next to me what he was drinking. The man was not intoxicated. He was sober. The men had the appearance of three business men. The man drank the beer without knowing the difference until I called his attention to it.

Thereupon the deposition of J. E. ELLIS was offered on behalf of the complainant, as follows:

Mr. Andrews, Counsel for Defendant: The defendant objects to all questions and all answers with regard to the substitution of Schober beer, or beer manufactured by the Schober Ice & Brg. Co., for Schlitz Beer on the ground that such answers and questions are immaterial and irrelevant.

Court: The objection is sustained.
Counsel for Complainant: We except to the ruling of the Court.

125 For the last two years I have been engaged in the retail business at Brownsville, Texas and Matamoras, Mexico. I was employed at Brownsville, but was owner of the bar-room in Matamoras. I have handled the following bottle beers: Cushannock, Monterey, Texas Pride, Southern Select and Schlitz. Southern Select is sold in a dark bottle with a dark brown label. They also had a beer they turned out in a light bottle but I never handled any of that at the time I was in business at Matamoras. In handling Schlitz beer and Southern Select beer I have served Southern Select to persons who called for Schlitz beer. Lots of times men walk in and I would give them a bottle of Alamo or a bottle of Select, which they would drink; lots of people came in, say give me a bottle of Schlitz, I give them a bottle of Schlitz. After they drank two or three bottles of Schlitz I gave them Southern Select; later I gave them more beer; after they get the taste once the taste continued.

In Matamoras the people are Spanish speaking. The officers over there are not in any way fools. They are pretty wise people and know one beer from another just as well as I, they would call for Schlitz when they wanted Schlitz and they got Schlitz. The other people, just the average man, asking bottled beer I would hand out the one I had the biggest per cent on.

Q. Mr. Ellis, how was it you were enabled to substitute a Southern Select when Schlitz was called for?

A. Why, it is dead easy. You know when we used to be over in Matamoras, you know, beer will get colder in ice water than it can with ice laying on top of it. I take my ice box, put cracked ice all through it and put a lot of salt on it. You take after this ice melts—you know there is a big run—you go to Brownsville and the saloon closes on Sunday. Matamoras is wide open; all the people in Brownsville go over to Matamoras to get their beer and have a good time, go over to the band concert; they come in—I reach down in the box, these bottles are all wet, all you have to do is to reach down in the box, pull the label off and hand it to them.

126 Q. Did you ever handle any other beer with the brown label?

A. I have handled Schober, Schober Ice & Brg. Co., San Antonio, Texas.

Mr. Andrews, Counsel for Defendant: The defendant objects to all questions and all answers with regard to the substitution of Schober beer or beer manufactured by the Schober Ice & Brg. Co., for Schlitz beer, on the ground that such answers and questions are immaterial and irrelevant.

Court: Objection is sustained:
Counsel for Complainant: We except to the ruling of the Court.

Q. I take three bottles with brown labels on them, I am speaking now of the other man that would come in and ask for one of those bottles, could you substitute one for the other by reason of the color of the labels?

A. Why certainly. Lots of times I would keep quite a quantity of Southern Select on hand and a very small quantity of Schlitz for the reason that I had some swell customers that liked Schlitz beer. Often when these parties would drink Southern Select, would say in Spanish, "Will take the same," all I had to do, I was standing around the bar, all I would have to do, (making motion with his hand) and the bartender would shuck the label.

Cross-examination.

By Mr. Patterson:

Q. Mr. Ellis, I believe you stated that it would be quite easy to shuck the labels, skin the labels all of them and substitute Southern Select for Schlitz?

A. Yes, sir; the color of the bottles, according to the man's taste.

127 Q. You also have stated that you substituted at innumerable times Southern Select for Schlitz?

A. Yes, sir.

Q. Isn't it a fact that every time you make such a substitution, you did so by shucking the labels?

A. Oh no, not all times.

Q. At the time you substituted without shucking the labels, how did you substitute it?

A. Well, put it on the bar, handed it on the table, people who did not know how to read or write.

Q. You couldn't substitute on people who did know how to read and write, unless they were drunk?

A. Sure, lots of times; they would order it in glasses. I have served champagne cider that comes in bottles and gave it to people and they never did see the bottle at all.

Q. So that whenever you substituted Southern Select for Schlitz, without shucking the label, you poured it out in the glasses and sent the glasses out to them, and kept the bottle?

A. Not all the time. I have sent it out many times. I have sent it out by Mexican waiters to customers who could read and write, to Americans. I have sent Southern Select out to customers who could

read and write, who called for Schlitz; sent the bottle out with the label on. That was after I had given them several bottles.

Q. He was pretty well stewed then?

A. I never allowed a man to get drunk in my place of business. He had several bottles before the substitutions but I never let a man get drunk.

Q. You wouldn't have risked that the first bottle?

A. No. I wouldn't. Figuring on the profit, the only thing I made money out of, Southern Select. Southern Select was very popular only with one certain party. It was very popular to me because he gave me $5.50 discount on the cask.

Q. Generally, when people would call for Schlitz, as a general thing, you would shuck the labels of the Southern Select
128 and substitute them for Schlitz?

A. If I could beat it to him.

Q. You can substitute after the first bottle of beer any other kind of brown bottle beer for Schlitz.

Q. I believe you can because I have handled many of them.

I had a signal that I passed my bartender to slip the labels, drawing one hand over the other. Reach down and get them and pull them off; not only to common ordinary Mexicans but I have handed them to bankers in Brownsville and they have drank it and smacked their lips after it.

Redirect examination.

By Mr. Meek:

Where the beer is in a brown bottle and the label is a brown bodied one with white lettering on it, it is easy to substitute that beer for Schlitz. The color of the label assists in making the substitution, every way in the world.

Recross examination.

By Mr. Patterson:

Q. The great majority of substitutions you have made of Schlitz—of Southern Select and other beers for Schlitz—have been made by skinning the labels?

A. Not at all times.

Q. But the great majority of them, haven't they?

A. Well, if I was behind the bar and two or three American gentlemen stepped up, say, "Take a bottle of Schlitz" they drink that beer; you take like over in Matamoras, and they have dice to shake for the drinks, they set down. I say, "Gentlemen, you have a seat?" They say, "Why certainly." I walk over behind the bar and send my porter out and get chairs for each and every one of them. They set down and get to drinking, get to talking about the

country and one thing and another. If they flap you for the
129 dice for drinks, all-right, they take another bottle of beer all right, take another bottle of Schlitz; about the third time you get Schlitz, why you don't get Schlitz.

Q. What do you get?

A. Well, Southern Select is the cheapest I can buy.

PETER BREIT, a witness whose testimony was taken by deposition on written, direct and cross interrogatories on behalf of the complainant, testified as follows:

During the past two years I have been in the saloon business and farming at Pharr, for about a year and a half, and I have been six months at Danna running a saloon and Cafe. I am familiar with the bottles of Schlitz, Southern Select and Alamo. The best known brands to me are Southern Select. We handled Alamo for about three months. I have been acquainted with agents of the Houston Ice & Brewing Company about two years and a half. Well, "Dan," I don't know his last name,—who was the head agent of the brewery and had sub-agents; then he's got a fellow by the name of Jesse Perez for subagent, runs from Harligan to Mission.

Dan and Perez called on me a year ago last April. I have also done business with Charles Gary, Mission. He is the agent at the present time. I have purchased beer from all three of them.

In relation to the purchase of beer from the Houston Ice & Brg. Co., Jesse said that I could sell that for Schlitz and I also sold it for Schlitz at the time to men that couldn't read. But sometimes they were pretty well soused or something like that; those who were Schlitz drinkers and handled this beer and they did not know the difference. Of course, how it came was because I did not have the Schlitz beer cold and just handed it to them and they didn't know the difference; they looked at it and it looked so much alike. The Houston Ice & Brewing Company's beer was marked with this label. (Indicating) Perez said I could sell this the same as Schlitz beer. He said it
130 looked like a Schlitz label and was a better seller. The Schlitz beer was mentioned in this conversation. He stated that the beer in brown bottles, these signs here, labels, would sell better than the old label. It looked so much like the Schlitz bottles because I never did handle beer in light bottles. I handled first, a package of light bottles but could not sell it. Another way, I handled black bottles a long time without any labels, which also sold for Schlitz. Had no label on it at all. I had them put up by special order.

I have handled those Schlitz and Southern Select in brown bottles bearing brown labels. I handled the Southern Select with that label on because it is a cheaper beer. I sold a good many bottles of Schlitz beer.

What was said to me just as I have answered here. He said you could sell this here as Schlitz beer, a fellow wouldn't know, take up the bottle, you wouldn't know, unless you just read it close. Schlitz beer cost me $10.30 a cask and the Houston $9.50.

I sold the Houston Ice & Brewing Co. beer for Schlitz beer. I

never paid no attention to the labels because it looked so much alike. It didn't cost me so much. I would make more out of it. I did that as often as I had a chance. If the man didn't look wide awake, I would hand him that Southern Select for Schlitz because I was making 2½ cents more on the bottle. The "S" on there (Southern Select) and that blue figure on here looked so much alike, of course they did not notice the size, they saw the blue label and the "S" on that; if they did not go to read; that "Z" come around and looked so much alike, those three marks, that "Z" (and the Schlitz label), that "S" and the blue figure.

At the places I have done business in Texas, my customers could read the lettering and writing in English, but they just thought they were getting the Schlitz beer because it looked so much alike. He wouldn't notice the size of the label, all he would look for just as I said, was this here blue figure and "S" and "Z."

Q. If you have answered that substitution of the Southern Select beer for Schlitz beer was made, what you state whether or no
131 the person in the habit of using Schlitz beer put up in dark glass bottles with brown labels thereon, would likely know that he was not being served with Schlitz beer in such a case?

A. Of course, I have been saying that right along. If he called for Schlitz beer, of course I would hand him this (Southern Select) I would sell it to him nine out of ten for Schlitz Beer.

Cross-examination:

I do not live in Houston, but my deposition is taken here. I am leaving the state for Chicago for six months, and will be back here in September again.

I owe the Houston Ice & Brg. Co. some debt on a dissolved partnership I was in. I gave the company a note and they are suing me on that now. I am not leaving the state for the purpose of preventing the Houston Ice & Brewing Co. from collecting this debt. I have work at Chicago to do. I have no defense in the suit which the Brewing Company has brought. I want to see my former partner and see what he is going to do about it. I told Mr. Strickland, the attorney at Mission, Texas, that I would make good at the rate of $25.00 a month.

I am not going into business in Chicago. I am coming back to Texas to go into the saloon business again. I gave as reference as to my good name the Pharr Bank, Danna Bank, McAllan Bank, and the Mayor of Danna and Marshall. I own property at Mercides, Texas.

I was born and raised and lived in Chicago 46 years and have lived 4 1-2, pretty nearly 5 years in Texas. In Chicago I was truck farmer; hot house business; real estate.

Q. Whom did you first tell that you knew of these things? Where was this and when was it and how did you come to tell it?

A. I told the Southern Select agents they looked so much like the Schlitz beer and then I told Swenson. I forget whether he was over at Pharr about this here or whether we got together at my

home in Chicago. But I believe we had some conversation
132 about this Schlitz. The conversation between me and Swenson, was in Chicago last May. I told Swenson I was selling Southern Select for Schlitz beer, the Southern Select label looked so much like the Schlitz label.

My home in Chicago is 7455 Ridge Boulevard.

The way my conversation with Swenson started was that I went to Milwaukee to the brewery to order a car of beer and we had a conversation about it, but I didn't have time to take it up with him. I told him to come to my home in Chicago on his way to Texas. He said he would be over there and see what I knew about the Schlitz and the Southern Select beer in regard to these labels.

Q. You have been asked to admit that you deliberately planned with an agent of the Houston Ice & Brewing Co. to swindle the public by palming off Houston Ice & Brewing Company for Schlitz beer and that you are guilty of having perpetrated this fraud. Is it true that you did plan this piece of deception and did carry it out? If you did, did you do so knowing what you were doing?

A. Yes. He said, "Well, you can sell that for Schlitz" and I did. Of course I knew that I was selling Southern Select for Schlitz. It was up to the man that used it whether he noticed it or not. If he knew he could turn the bottle back. It was open to him.

Q. Did you do this wrong for the money there was in it?

A. Well, for the money and to get a joke on the Schlitz drinkers. I done it a whole lot more for the joke on these fellows to get them to pay 15 cents where they could get two for a quarter by not watching out.

Q. Is it more wrong to swear falsely than it is to purposely deceive people?

A. Well, I say that I didn't deceive them, I just done it more for a joke. They wouldn't know the difference you know. No sir, I would not swear falsely for money.

133 The Schlitz beer costs more money that the Southern Select and there is a better demand for it. Yes, I certainly got money when I did it. I made 2 1-2 cents a bottle on it. The Houston Ice & Brewing Co. have not quit selling me beer. I've got some of their beer in the house today. They sold me beer whenever I wanted it and I have kept on buying it. I am not selling as much Southern Select now as I used to to the Danna customers. They prefer the Alamo more than the Southern Select. For that reason I haven't bought as much lately as I used to. There is more Schlitz beer sold over my bar than any other beer right now and always has been since I started in the saloon business.

Q. Why do you suppose it is that the parties interested in taking your testimony have not called on some of the others also?

A. Yes, because I was selling more Schlitz. Mine was a Schlitz house, being a northern man, and all these northern men came in there; they want to have Schlitz beer, and every once in a while I put this Southern Select on them to see if they noticed the difference and they didn't; I just had a joke on them.

Q. Have you sworn that the label used by the Houston Ice &

Brewing Company is such a one that the public generally cannot distinguish beer in bottles bearing this label from the Schlitz beer?

A. Well, they can; of course they can. In a rush, you see, you can sell this beer for Schlitz and you can sell it to men that can't read if they call for Schlitz. It looks so much alike after taking off the neck label. You couldn't do it unless you take off the neck label. You can sell them this. They don't look at the label; I give that statement before, that is the only statement I can give. Looks so much like Schlitz beer. There is nothing but truth which I have said.

134 Thereupon JOHN HENICKER was called on behalf of the complainant, and testified as follows in answer to questions by Mr. Kronshage:

I live at Humble, Texas, and am in the liquor and oil business. The bottled beer I handle is San Antonio and Southern Select. I do not handle Schlitz.

Q. Do you know of any circumstance where a customer of yours had been drinking Southern Select beer and subsequently told you that he thought he had been drinking Schlitz?

A. Yes, sir, I have one or two that way. In the last two or three years. A year ago, or may be a year and a half ago, there was one man in particular by the name of Hill who was putting in some machinery there for Mr. Bender and he was there four or five weeks and he came in and called for a bottle of beer and I gave him a bottle of Southern Select. After he had been there three or four weeks one day at dinner-time he came over and got a bottle of beer, I thought he wanted that all the time, and when he happened to read the label on the bottle, he said, "I thought you knew what I drink, that I wanted Schlitz." I explained to him that I had not handled Schlitz for two or three years and he said: "I know different" and he got mad and left. I told him there was no Schlitz in town and we had not handled Schlitz for a number of years and that I did not misrepresent anything. I thought that was what he wanted. So I had a talk with him and he got mad with me over it, and I told him I had never misrepresented anything and that because he had been drinking that right along I served him with Southern Select, and I said, "Because you could not distinguish the difference that is your fault." He is a personal friend of mine. He realized that he was wrong.

Mr. Hill was representing a house of Indianapolis, Indiana, putting in dry kilns around saw-mills. He is not in Humble now. His headquarters were Indianapolis, Indiana. He was putting in dry kilns for a saw mill owned by Mr. Bender of the Bender Hotel.

135 The foregoing testimony wherein the witness quotes what his customer said was objected to by defendant. Objection was overruled by the Court, to which defendant excepted.

Cross-examination.

By Mr. Andrews:

I know nothing about any mistake on the part of this customer except what he told me. I did not misrepresent anything. He liked the beer but he had it in his head he was drinking Schlitz all the time and he happened to read the label that one particular time and jacked me up about it. I tried to explain to him, and he got mad. And after he found out how it was, he was a good friend of mine. I said, "If you had read the label, it did not say Schlitz, it says Southern Select. You could see. This customer he really thought that he was drinking Schlitz when he was drinking Southern Select.

My trade is not large at the present time. I have been in business at Humble ten years and have been selling Southern Select put up in brown bottles with a brown label since they began putting it up. I expect three or four years ago.

Redirect examination:

I have never handled Southern Select beer in white bottles with a white label. I stopped handling Schlitz three or four years ago. I guess it has been five years. It was before I commenced to handle Southern Select.

Recross-examination:

Q. You started to say there was a lot of something about Schlitz beer you were interrupted.

A. Well, there were a lot of dirty bottles, may be a dozen in a cask or two dozen, and the agent would not allow for it,—straw wrappings around the bottles, and I would have to throw them away
136 and they would not make it good, and I just quit handling it because I was handling it at a loss.

Plaintiff Rests.

Thereupon, J. R. BERND, called on behalf of the defendant, testified as follows, in answer to questions by Mr. Andrews:

I live almost anywhere, wherever I work is my home. Until recently I worked in San Benito, Texas. For seven years I worked in Houston as chief engineer of the Houston Packing Company. In San Benito I worked for the Houston Ice & Brewing Company operating an ice plant and looking after their affairs. I have lived there since the 16th day of last October. I looked after putting the Houston Beer on the market down there. I tried to introduce it into the different saloons. I principally introduced it into Mr. Buesing's saloon. He is the only man I have any dealings with, with the exception of orders that were sent through Mr. Buesing.

I believe a little instance in regard to my mistaking the label of the Houston Ice & Brewing Company for that of the Schlitz Brewing

Company came up in Mr. Buesing's saloon. On two occasions I went there with a gentleman for a refreshment and we sat down at the table both times and ordered Southern Select and they brought me Schlitz, and I called their attention to the fact the moment they set it down. I do not know the name of the barkeeper, he was called "Dutch." Mr. Buesing told me before that this could be done but he did not succeed in doing it. He tried it twice.

I looked after the sale of the Southern Select beer and it sold readily to customers as Southern Select beer. Mr. Buesing was not selling it but I talked to him about it. He was handling Schlitz beer. I cannot tell you what volume of business I did down there but I knew it was enough to pay all expenses and a profit.

137 Cross-examination.

By Mr. Kronshage:

I was the only agent of the Houston Ice & Brewing Company at San Benito subsequent to October, 1914. I have not quit. I just called up yesterday. I am not the general agent down there now but I am still working for the Houston Ice & Brewing Company and am here waiting to go to Manbasota.

I did not sell Houston Ice & Brewing Company's beer to any one else outside of Mr. Buesing. If any other saloon man in San Benito wanted our beer he would have to get it through Mr. Buesing. He did not have to do it but some way or other he did. He could have gotten it direct from me. Mr. Buesing was the only man I sold beer to, that is I delivered to him out of the vault and I do not know what he did with it. There were other saloons in the city of San Benito besides Mr. Buesing's and he supplied these other saloons with our beer.

I do not know how long it was that this bottle of Schlitz was sold to me when I called for Southern Select. It was last year, 1914, after October, after I got down there. I would not like to go on record as to the date.

The second occasion when I was served with a bottle of Schlitz instead of Select was not on the same day. It was afterwards. I cannot say whether it was the next day or the next week or the next month. I do not know whether it was the same day or not, or the next day of the next week or the next month or the next year.

Redirect examination.

By Mr. Andrews:

I was asked, the way I understood it, the length of time that elapsed between the dates that they passed the beer off on me. It was not the same day, but I would not say it was the next day or any other intermission of time. There was an intermission of time long
138 enough to make an impression on me and for me to know that it was not the same day and that it was the same year.

There is one other saloon down there handling beer which is a barkeeper named "Dutch." I have worked for the Houston Ice & Brewing Company seven years to a day.

M. B. PARKER, called on behalf of the defendants, testified as follows in answer to questions by Mr. Andrews:

I have lived most of my life at Bryan, but I live in Burelson County, across the line between Brazos and Colorado. My business is mostly farming and saloon business for a side issue. I am interested in a saloon at Pitsbridge about 15 miles from Bryan on the Interurban Railroad and at Grant, Texas, about 3 miles below on the same railroad. These stores are on land belonging to my father's estate and have been there for 15 or 20 years and are run in connection with the farms.

I have done business with Mr. Selvage at my place of business. He has been there more than once. He has been there several times when I was not there.

I buy beer from the Houston Ice & Brewing Company in car loads and supply both stores from such purchase. I handle Schlitz for 3 or 4 years. I never heard of any substitution with Mr. Selvage of Southern Select beer for Schlitz beer at one of my stores.

Q. Are the customers at such places (country stores) particular about getting the kind of beer they order?

Counsel for Plaintiff: We object to that as incompetent and irrelevant in calling for opinion and conclusion of the witness.

Court: You may answer.

Counsel for Complainant: We except to the rule of the Court.

A. The way it is with me, I run these places there for the
139 accommodation of the people living around there, and there are only two or three white men connected with the farm, the rest of them are negroes. There are two or three gentlemen there and if they like any particular beer they ask me to buy a particular beer and I buy it. That is the reason I buy Southern Select, because these old gentlemen said it was good beer—he was on the place before I was there and I took it for granted it was good beer and I buy it and they do not object to that.

Cross-examination.

By Mr. Kronshage:

I have not been living in Bryan since December, 1913. I now live twenty miles from Bryan. My wholesale business is conducted at Pitsbridge, fifteen miles from Bryan and five miles from my farm.

I was at Pitsbridge at the time the first car load of Southern Select arrived. I took out my wholesale license in the fall of 1914 but I was in a retail business before I moved away from Bryan.

I first saw Southern Select beer about two or three years ago. It was put up in white bottles. I do not know whether I carried it in

white bottles a week or a month or a day or a year. I do not know what the label on the white bottle looked like. It has been a good while since I handled any white bottles beer. I cannot say whether I handled it two or three years. I think I got the first Houston Ice & Brewing Company's beer in brown bottles with a brown label in the fall of 1914. The fact of the business is I have not paid much attention to the business on account of having my farm. I am a large planter out there and am merely running these stores as an accomodation to my help and the people around there and try to run them right. I leave the management of the stores largely to em-
140 ployees.

Examined by the Court:

I cannot tell whether Mr. Selvage was at my place of business when the first car load of Southern Select arrived. I was there when it arrived and when it was unloaded. I have not given an order for the Southern Select in car loads at any other time. I bought some beer here lately from the brewery.

I cannot say positively whether I was present when the cask was opened up at my two stores. The car came in on this new road and was unloaded on a side track and it was moved into this new place out there. I cannot say that I was present when the cask was being opened in the store. I was merely present when the car arrived and it was put in the warehouse.

Thereupon, E. F. BERRY, called on behalf of the defendant, testified as follows in answer to questions by Mr. Andrews:

I was in the employ of the Houston Ice & Brewing Company as traveling salesman from some time in April 1914, to the first of December this year (1915). I covered the following territory: Aransas Pass and Brownsville railroad from here to Corpus Christi and N. O. T. and Mexico to Laredo and Beeville and Gonzalis and that section in there. I have nothing to do with filling the orders, nothing more than to take the orders, I sold beer in brown bottles and in white bottles. Customers would designate the color of the bottles. Often, when they made the order, they would take some white and some dark bottles. The dark bottles had dark labels and the white bottles white labels.

Q. State whether or not you made any representations to any of the dealers that they could sell Southern Select for Schlitz beer because of the color of the label of the Southern Select bottle.

141 Counsel for Complainant: We object to that as leading and suggesting.

Court: The objection is overruled.

Complainant accepts.

A. I have never suggested that it be sold as Schlitz because I never mentioned any other beer to the people I work for. I figure that

every "knock" is a "boost." I do not recall any one that handles Schlitz in the territory I am.

Thereupon CHARLES ZELLER, called on behalf of the defendant, testified as follows in answer to questions of Mr. Andrews:

I am in charge of the Bender Bar. I open the house at 6:00 o'clock in the morning and stay until 12:00 and am back from 5:00 until 7:00 or 8:00 o'clock in the evening. I have worked for the Bender Hotel three and one-half years with the exception of eight months, when I worked at the Schlitz Bar on Prairie Avenue and Main. At the Bender Bar I employed the bartenders and porters who worked under me and took their instructions from me.

I know a man by the name of Barringer. He worked for me about two months and left about three weeks ago and is working at the Interurban Bar. The manager of the Schlitz Bar is a man by the name of Louis Richter. He also manages the Interurban Bar. I also knew a negro named Wesley Johnson who worked under Mr. Barringer at the Bender bar. He is not working there now. He quit.

I never gave orders to use Southern Select in place of Schlitz. We had Schlitz, Budweiser, Blue Ribbon, and all beers; and whenever a man walked into that bar, my order is to give him what he calls for and what he asks for. If he asks Budweiser, give him Budweiser, if he asks for Schlitz, give him Schlitz, if he asks for a bottle
142 of beer, give him Southern Select. I never instructed any porter to receive any sign from the barkeeper and upon receipt of that to substitute Southern Select beer for Schlitz and I knew of no such custom or practice existing at my bar.

I do not know that Mr. Japhet has anything to do with the Schlitz bar. He hired me and he distributes Schlitz beer in Houston and that is what makes me say he is agent.

Mr. Barringer left me on Saturday the 28th of February and on Monday morning, March first he took a job at the Interurban bar. I was paying him $80.00 a month and he told me that he left me because he was to get $100.00. We have a first class trade at the Bender Bar and have lots of calls for Southern Select beer.

Q. What effect, if any, would substitution of one beer for another that was not called for, have upon a trade of that kind?

Counsel for Complainant: I object to that as calling for a conclusion and opinion of the witness.

Court: If he knows he may answer.

Counsel for Complainant excepts to the ruling of the Court.

A. We would lose business—we would lose our trade.

Q. What is the character of competition between that beer and other beers in the city, if any?

Counsel for Complainant: I object to that as calling for the opinion of the witness.

Court: If the witness knows he can state.

143 Counsel for Complainant excepts to the ruling of the Court.

A. The competition between the beers is very strong in Houston.

Cross-examination.

At the Bender bar I go under the name of "Head Bar Tender." I am there merely on salary. Mr. Swearinger, manager of the hotel attends to the purchasing of supplies for the bar and I get the supplies on requisition.

Southern Select beer costs $9.70 a cask and Schlitz beer costs $11.25 a cask.

When a customer comes into my place and calls for a bottle of beer my orders are to serve Southern Select. Yes, sir, I carry other Houston beer, Pilsner, American Brewery, Lady of the Lake or something like the Statue of Liberty in a drab label with a little red and blue and variety of colors.

My instructions are when they call for a bottle of beer to give them Southern Select in brown bottles with a brown label—not a brown label—a yellow label. I do not know why we do not keep Southern Select in white bottles with white labels. That is the brewer's affairs and the man buying it. I only use what I get.

I have never had occasion to put in a requisition for Southern Select in white bottles and the trade do not call for it. I do not know that down at the Brazos Hotel they handle Southern Select only in white bottles and that the big Casino Restaurant handles Southern Select only in white bottles. I get no commission on the amount of profit which the bar at the Bender Hotel makes and never have while I have been connected with the bar. I get nothing but salary.

It is pretty hard to remember the names of the porters I have had for three years past. There was Ed Brown, Westley Johnson, Will Howard, and a man by the name of Jones. I do not know

144 who was a porter before Jones who left about thirty years ago. The auditor keeps track of that. I do not. The auditor pays these porters.

Thereupon THEODORE FRIESMEYER, called on behalf of the defendant, testified as follows in answer to questions by Mr. Andrews:

I live at El Campo, Texas, and have been in the saloon business there seventeen years. I handled Southern Select but do not handle Schlitz beer at present. I have handled it. I know Mr. Swenson but he has not been down to El Campo for a year or so I guess.

Q. Do you know of any substitutions that are made down there, that is selling Southern Select beer for Schlitz, or selling Schlitz beer on call for Southern Select?

A. No, sir. Anybody could have seen the difference in label. They could tell that.

Counsel for Complainant: I move to strike that out as an expression of the opinion of the witness.

Court: The objection is sustained to strike out.

Defendant excepts to the ruling of the court.

Cross-examination.

By Mr. Kronshage:

I used to handle Southern Select beer in light bottles. I commenced handling the dark bottles for the last year or so. I have also handled Lone Star, Texas Pride, Pearl, Budweiser and I used to handle Blue Ribbon.

I used to handle Schlitz, but stopped handling it about a year ago or over, but not more than two years ago. I commenced handling Houston Ice & Brewing Company's beer in brown bottles with
145 the brown label between one and two years ago. I am no longer handling it in white bottles. I do not know why I am not handling it in white bottles.

Q. What did the white bottles look like? What sort of label was on the Southern Select in white bottles?

A. Southern Select, that is all.

Q. What was the color of the label?

A. Well, it was pale, similar to the bottle a little.

Q. Was it red, white and blue?

A. Very little color.

Q. What kind of label?

A. I say similar to Pabst, light label.

Q. What else was on it?

A. Southern Select.

Q. Were there any colors on the labels at all?

A. I could not tell you the colors. I think it was striped—but I did not pay particular attention to the color of the label.

The letters on the label were written letters.

Q. They have stopped furnishing you with that?

A. That is not my business. I do not handle that part of it. My customers do not call for this Southern Select in a light bottle and a light label on it. I cannot say that I ever had any distinguished or distinction of that kind. I never took pains to ask for any more of this Southern Select in light bottles with a light label. I just as soon handle dark bottles as light bottles.

Redirect examination.

I did not specify any particular color when I ordered Southern Select beer and I have no preference in the matter. Bring up a cask of Southern Select is my order.

Thereupon H. P. FULKENHAGEN, called on behalf of the defendant, testified as follows:

I live at Beaumont, Texas, and am engaged in the wholesale American bottle beer business and saloon business. I was in
146 that business when I went on a Trades' Excursion of Business Men from Beaumont to Nacogdoches on the T. & N. O. Railroad. There was both Southern Select beer in brown bottles with brown labels and Schlitz served on that train.

I was in the commissary car which was on that train at different times and through the train at different times but I heard no comment on the Southern Select beer except such as was made by Mr. Callahan.

Thereupon A. FAHRENTHOLD, called on behalf of the defendants, testified as follows in answer to questions by Mr. Andrews:

I live at El Campo, Texas, and am in the wholesale beer business selling different kinds, both San Antonio and Houston beers, I do not sell Schlitz. I stopped selling Schlitz about a year ago.

Q. Did or not, the fact that you could get the Southern Select beer in brown bottles cause you to stop Schlitz beer?

A. Not all together.

Q. What do you mean by that?

A. Well, I wanted to reduce the stock of other beers I had on hand. I had other beer on hand and I wanted to get rid of some.

Q. Did the color of the bottle, or the color or the label used on the bottle of the Southern Select beer as put up, have anything to do with causing you to stop selling Schlitz beer?

Counsel for Complainant: We object to that as leading.
Court: Objection is overruled.
147 Counsel for Complainant except.

A. No, sir.

Southern Select beer in brown bottles is not sold to persons ordering Schlitz beer for Schlitz beer. I sell to all the barrooms at El Campo and am in them more or less frequently. I do not know of any substitution in El Campo that has been made in the last two years of Southern Select beer for Schlitz beer.

Thereupon, HENRY PETRI, called on behalf of the defendant, testified as follows in answer to questions by Mr. Andrews:

I have lived in Temple, Texas, for about nine years and am a saloon proprietor. I know two men by the name of Blum at Temple, one the uncle and the other the nephew. They are in the beer business. I sell in my saloon Budweiser, Schlitz, Southern Select, Texas Pride, and San Antonio beer.

I sell Southern Select beer in brown bottles only. I have no preference about it and do not specify the color of the bottle when I order. The Southern Select in brown bottles is the only beer put up by the Houston Ice & Brewing Company which I sell, and I have been selling it for about three or four months. There are other saloons at Temple selling it. I have not seen of any instance of my barroom

and know of no occurrence in my barroom where customers have drank Southern Select thinking they were drinking Schlitz.

Cross-examination.

By Mr. Kronshage:

I know what the package in which Southern Select beer is put up in the light bottles looks like. As near as I can remember it is a kind of white label and it says on it "Southern Select" as well as I can recall it, in black letters. A white lily or magnolia and
148 I think there were little red lines around it. I have handled Southern Select in white bottles and since the new agency up there I have had it in brown bottles.

The first time I handled Southern Select was in white bottles, as near as I can remember, that was about a year ago, I think, I cannot positively say.

I think I first saw Southern Select in brown bottles with brown label since they have had an agency at Temple the last time. Their present agent's name is Mr. Hardy Christian.

Redirect examination:

Schlitz agents at Temple are Blum Brothers. Mr. Wm. F. Blum, Jr., is a nephew of W. F. Blum, Sr., and Charles Blum, Jr., runs a saloon and a negro by the name of Nelson is his porter.

Thereupon, W. M. McKINNON, called on behalf of the defendant, testified as follows in answer to questions by Mr. Walne:

I live in Houston and am in the saloon and restaurant business here about ten years. I handle Schlitz beer and also Southern Select. I have handled Southern Select in dark bottles at the bar about four months.

In my place, which is a large one, I know of no practice to substitute Southern Select beer for Schlitz beer when Schlitz beer is called for. The competition among various saloons in Houston is very keen.

Q. What effect would it have on your business to indulge generally in the practice of substituting one beer for another, and not serve the beer called for.

Counsel for Complainant: We object to that as a conclusion. If he has never done it it would be guess work.

149 Court: The witness may answer if he knows.

Counsel for Complainant accepts.

A. Well I think it would be about the same in any kind of business if a man substituted anything that he would not have any business very long.

At my bar there is very little difference between the volume of sales of Southern Select and of Schlitz. I consider Southern Select a first class beer. My experience is that people come in that drink

Budweiser that you cannot give Schlitz or Southern Select and some business customers come in and call for Schlitz that you cannot give Southern Select or Budweiser, and some customers come in that cannot give anything but Southern Select. There are some customers that you cannot substitute any other beer on. I think that applies to all of them, as well as to Southern Select. We sell all beer in bottles fifteen cents straight or two for a quarter and fifteen cents straight for all bottle beer in the grill. I do not make any preference for any of them.

I cannot tell positively the difference in cost to me between Southern Select and Schlitz but Schlitz costs the most.

Cross-examination.

By Judge Meek:

Q. Is it not a fact that in your trade that if a man who is not familiar with labels should call for Schlitz that you could serve him a bottle of Southern Select?

A. Well, that would be hard. Of course if you want to do anything you could serve him anything, if you wanted to.

Q. I am speaking of a customer who is not familiar with the label, if you saw fit, and if that man would come in there, by reason
150 of the similarity of the two labels could you not serve him a bottle of Southern Select instead of Schlitz?

A. Well, to tell you the truth I do not think it could be done unless there was "nobody home up here" (indicating his head,) but I do not think any intelligent man could have a bottle of beer put across if the label was there. I do not think an intelligent man could be imposed upon. He could see what he was getting.

Thereupon, W. B. BLACK, called on behalf of the defendants, testified as follows in answer to questions of Mr. Walne.

I have been engaged in the malt and liquor business at Morgan's Point since about 1902. I handled Schlitz and Southern Select both put up in brown bottles with brown labels on them. In my experience in selling these two beers nothing has come within my knowledge of any practice of substituting Southern Select beer for Schlitz beer when Schlitz beer was called for by the customer.

Q. If you had a call from a customer for Schlitz beer and you had no Schlitz beer on hand, but did have Southern Select beer in the ice box, what has been your custom with reference to taking care of that customer?

A. Well, if I had run out of one or the other I would have told him that we were out of Schlitz or out of Southern Select.

My sales of Southern Select beer and my sales of Schlitz beer are about two to one in favor of Southern Select. The price I charge is the same.

Cross-examination:

Q. What do you pay for Southern Select a cask?

A. $9.75.

Q. What do you pay for Schlitz?
A. $11.75.

151 Thereupon, JOHN C. DALE, called on behalf of defendants, testified as follows in answer to questions by Mr. Andrews:

I am in the saloon business at Lynchburg, Texas, and sell Southern Select, Budweiser, and some American Brewing Company Pilsner. I sell Southern Select in both black and white bottles. I have no preference in what color bottle it is put up. When I order I do not specify one or the other. The reason I handle black bottles is on account of the light. It keeps better in dark bottles than in light. I have been in the saloon business about thirty-one years, down here seven years and also in Indiana, Illinois and Minnesota.

I do not handle Schlitz at all at the present time, but I have handled lots in my time. I have handled a lot of different bottle beer, Cook's and Pabst's beer. They are all in dark bottles. I know of no instances that have occurred in my saloon where persons wishing to purchase Schlitz beer have drank Southern Select thinking it was Schlitz.

Cross-examination.

By Mr. Kronshage:

The last time I handled Schlitz beer put up in brown bottles with brown labels with white lettering was in August of last year I think. I have carried Budweiser all the time; as long as I have been in Texas and in other places where I worked. I have carried it all the time at Lynchburg, a period of over two years. Budweiser is a beer that is called for generally. I have carried Budweiser in the State of Texas for about five years.

Q. Budweiser beer keeps pretty well?
A. Yes, sir.
Q. Does not spoil in white bottles?
A. Did not give it a chance to spoil because I sold it out.
Q. Does Southern Select spoil in white bottles?

152 A. About what portion of the Southern Select that you sell is put in white bottles?

A. Well, very little. I have not been selling much of anything. I have sold nothing but keg beer and "splitz." The trade I have is oil trade and they cannot afford very much for beer, they cannot afford to pay fifteen cents. I handle Magnolia beer. My trade down there is can trade or labor trade. In the summer time I have a strong bottle beer trade in "Splitz." They have no label on them and sell for five cents a bottle.

Q. What sort of a label has Budweiser beer, if any?
A. That has a white label on it. I could not say it was white but there is color in it.
Q. The general background or body of the label is white?
A. Yes, sir.
Q. What other colors are printed on the white?

A. Well I do not know of any other color only the ink.
Q. What color ink is printed on the label?
A. Black.
Q. What other color besides black?
A. I never took so much notice. I would not say because I do not know. All I can remember is white label and black ink.
Q. What does it say under Budweiser?
A. Well, Anhauser-Busch, St. Louis.
I have handled Budweiser for thirty years, but I do not know anything else on there but Budweiser and St. Louis and Annhauser-Busch and the label is in black ink. I do not take any study of this label. I know about all labels but I cannot tell what is on there. There may be a lot on there that I never looked at in my life.
Q. Is there any other color on the label besides black?
A. And the white part of it.
Q. Is anything else but black and white on the Budweiser?
A. Well I do not know what you mean, what you call color. There is a whole lot on the label.
153 Q. You know what color is?
A. Yes, sir, color, white and black ink.
Q. Is there a picture on there?
A. Not that I know of. There is a little Cross on it over St. Louis, where they have written in Annhauser-Busch. I think it is the eagle.
Q. Where is the eagle on the label? Is it perched on a tree or bush or flying?
A. Well, I never took notice of the label at all, but I know what Budweiser label is, but I cannot answer that question.
Q. Suppose I put a bottle of beer right here on the table, how would you be able to tell me whether or not it was Budweiser beer?
A. Well, if you are accustomed to drinking Budweiser beer and you went into a saloon and asked for a bottle of Budweiser and was sober and was not under the influence of liquor you could tell the difference.
Q. How would you tell the difference? Suppose you went into the Rice Hotel Bar how would you tell it was Budweiser without reading the label?
A. I can tell by the taste of it, in a natural condition if I did not have too much.

Thereupon, HENRY LAHOURCADE, called on behalf of the defendant, testified as follows in answer to question by Mr. Walne:

I have been in the saloon business at 206 Main Street, Houston, for 19 years. I sell Schlitz beer and Southern Select in brown bottles. Within my knowledge at my place of business there has been no practice of substituting Southern Select beer for Schlitz beer when Schlitz beer was called for by a customer.
Q. Aside from the morals of it, what effect would such a practice likely to have upon your business?

154 Counsel for Complainant: I object to that as calling for the conclusion of the witness and as irrelevant and immaterial.

Court: The objection is overruled.
Complainant excepts.

A. I don't think it would help me—it would not help my business. At my place the volume of the sale of Schlitz is about the same as the sales of Southern Select. I sell them for the same price. The cost of Southern Select is about $2.00 less. Southern Select has a trade of its own, because I have been requested by several customers, I don't know who they were, but requested to have a beer on hand, because it has given satisfaction, that is just my view of it. I was requested to try it and see what it would do. It is a fine quality. I think it is a high grade beer. I never heard of a practice prevailing among saloon men to sell Southern Select beer for Schlitz beer, in cases where customers called for Schlitz.

Thereupon, L. SCHARCK, called on behalf of the defendant testified fied as follows, in answer to questions by

Mr. Andrews:

I have a saloon at the Cotton Hotel and have been in the saloon business in Houston about eleven years. I handle Southern Select beer in brown bottles. I have always believed that beer keeps better in brown bottles. There is no connection between my preference between the brown bottles for Southern Select and the fact that Schlitz beer is put up in brown bottles. I sell both kinds of beer.

Most of my customers know what they want and call for it. If a man comes in my place and calls for Schlitz beer he gets Schlitz beer; if he calls for Budweiser he gets Budweiser. That is my invariable rule.

155 Cross-examination.

By Judge Meek:

Until I began handling Southern Select I also handled Moline beer of Cincinnati in brown bottles.

There is no trouble about Budweiser beer ever spoiling. I have handled it for thirty years. I have seen some of it spoil, but you get bad bottles in all kinds of beer. I do not know that there are more bad bottles of Budweiser than any other beer.

Thereupon, L. SCHARCK, called on behalf of the defendant, testified as follows in answer to questions by Mr. Walne:

I have been in the restaurant and saloon business in the City of Houston for 31 years. My present place of business is 1108 Preston Avenue. I sell both Schlitz and Southern Select beer in dark bottles. Since I have been handling the two beers together no substitution of Southern Select for Schlitz has come within my knowledge. I sell more Schlitz than Southern Select. I sell them at the same price. There is an establis-ed way with people who prefer to drink Southern Select beer. It is a good beer—a high grade beer.

Cross-examination.

By Judge Meek:

I do not permit the substitution of one beer for another at my place. When I first began handling this beer in brown bottles and a yellow label, when I first got it in, I cautioned my barkeepers about it and told them to be careful and keep that bottle beer separate so they would not make mistakes. I have excellent barkeepers and so far as I know no mistakes have been made.

156 Thereupon, S. J. CREAGOR, called on behalf of the fendant, testified as follows in answer to questions by Mr. Andrews:

I am a traveling salesman for the Houston Ice & Brewing Company and travel out of Houston pretty much all over the State and occasionally to Louisiana. I have been associated with the Houston Ice & Brewing Company about six years and have been traveling salesman for the last three years. In selling Southern Select some of the purchasers specified in their orders what color bottles they want and some do not. I always ask which they prefer, white bottles or dark bottles. There is a difference in the beer in the white bottle and the dark bottle. I have always considered the dark beer the heavier and I always ask which they prefer, the light beer or the dark beer.

The Houston Ice & Brewing Company's beer is sold in competition with Schlitz beer in the territory through which I travel. Many of my customers sell both kinds. The usual price of Southern Select is $9.25 delivered.

Q. Do you know, in the territory that you cover, of any substitutions that have been made of Southern Select beer for Schlitz beer on account of the color of the bottle or the color of the label?

A. Well, no, sir, they would not tell me about it. I do not recommend and urge the sale and purchase of Southern Select beer because of the similarity of labels and bottles between it and Schlitz. I make no recommendation to the trade to substitute it for Schlitz.

Q. And you say you do not know of any instance where that has been done?

A. No, sir, that is, no instance where Southern Select beer has been substituted for Schlitz.

Q. Yes, sir, where the purchaser was ignorant of the substitution?

A. Well, it is very easy to substitute. You take in Southwest Texas, where black bottles—I have walked in and asked for
157 Southern Select and I have seen Schlitz and I have seen Cook's Pearl. I called for Southern Select and they would not have a bottle of Southern Select in the icebox—I am talking about where the purchaser has been deceived.

—. —.

A. No, sir.

Q. In the territory you speak of, you say that it is the practice if they have not the beer called for they give you some other beer?

A. They would give you a black bottle of beer if they have got it and if they have not they give you a white bottle of beer. And that is easily detected by me because I usually notice what they sell.

Cross-examination:

I sell Mr. Christian at Temple. I have not been there since last November. I could not say positively but I think I sold him beer in dark bottles. The last time I was there I sold about a half carload and I think it was in dark bottles.

Examined by the Court:

I know a man engaged in the saloon business at Stafford by the name of Tomlinson. I think maybe three years ago I sold him one or two casks of beer, that is all.

Q. How did you come in contact with him, if you recall, by correspondence or by a visit?

A. By visit.

Q. Did you ever call the attention of Mr. Tomlinson to the similarity in the bottles of Schlitz and Southern Select beer and suggest to him that he could sell Southern Select for Schlitz?

A. The last time I called on Mr. Tomlinson, I only called on him one time and did not call for about two years, but I broke down in my car near there and I went to use the telephone, and while standing there they were unloading some Schlitz beer, and that was called to my attention, and I told him I had a better beer in a black
158 bottle with a brown label, and he told me what Schlitz cost him and I told him I had as good or better than Schlitz. Sold for less money.

Q. Why did you say that your beer was put up in brown bottles with a brown label?

A. Well, Schlitz was put up in a brown bottle with a brown label.

Q. Did you think that the label had anything to do with it?

A. No, sir, absolutely not. I have never advised anybody to substitute Southern Select beer for Schlitz. That would not do me any good.

Q. This visit was about a year ago and I did not sell him anything. I did sell him, as well as I can remember, about three years ago.

Thereupon, R. L. AUTREY, called on behalf of the defendants, testified as follows, in answer to questions by Mr. Andrews:—

A corporation by the name of Houston Ice & Brewing Company was organized in the last days of 1892 and operated the "Magnolia" Brewery until December 31st, 1901. That corporation was succeeded by the Houston Ice & Brewing Company, which continued the business of the "Magnolia" Brewery until the 22nd day of October, 1914, when it was dissolved and succeeded by the Houston Ice & Brewing Association, which is a trust of several trustees. The physical operation of the plant has been continuous from 1892 up to the present time.

At the beginning, while the brewery was building, I entered the employment of the company as bookkeeper, and later, some four or five or six years later, I became secretary and treasurer, and remained secretary and treasurer of that corporation, I think, until its

dissolution. I filled a like capacity for the Houston Ice and Brewing Company, organized in 1902 and became vice-president and treasurer of that company six or seven years ago. I am now vice-president and treasurer of the Houston Ice & Brewing Association.

159 The second corporation was dissolved by operation of a suit filed by the State to forfeit its charter together with seven other breweries and other concerns sued at the same time on the ground that they were running in violation of the antitrust law. There was no trial. The case was compromised.

The Houston Ice & Brg. Co., from the beginning has been publicly known as the "Magnolia" Brewery, properly known as such. The corporate name is not known to very many persons now. From 1892 to date lager beer in both bottles and kegs and ice have been manufactured at the plant.

Since 1892 I have looked after the accounts and the bookkeeping of the company. I have here a statement of the output of the brewery taken from the sworn government record, the record upon which we paid taxes.

The total output of the brewery, keg as well as of bottle beer, from 1893 to December 31st, 1914, was 2,175,987 barrels government measure. In the statement the number of bottles shown posted each year is correct. The first year, 1893, the output was 25,738, and in the year 1914 it was 178,000 barrels. That is the statement of the amount brewed. The sales made in 1914 by both the old company and the new association amounted to 166,573 barrels.

The statement you now show me shows a number of barrels of beer sold during the year and the price it sold for; the total number of barrels, both kegs and bottles. The statement shows the number of bottles upon which tax was paid during each of the years from 1893 to 1914 inclusive, as well as the price for which it was sold.

(Tabulated statement headed "Beer Brewed," marked "Defendant's Exhibit A," and tabulated statement headed "Beer Sales," marked "Defendant's Exhibit B.")

I have here a statement that begins with 1905 and which runs until December 31st, 1914, which shows the amount paid by

160 the Houston Ice & Brewing Company for advertising its product during these ten years in the amount of $124,647.96. That covers everything we charged to our advertising account, such as newspapers, lithographed cards and publicity and street car advertisements. (Statement marked "Defendant's Exhibit C.")

We have sold beer in all sections of the State of Texas, which is not dry, and some that is dry too, and in Louisiana and Florida.

Q. Do you do any business in Cuba?
A. No, sir. We have done some export business in Mexico.
Q. Any business in Oklahoma?
A. Yes, sir; we have done a little business in Oklahoma.

The name "Southern Select" was used from the beginning in our bottling business in 1892 or 1893, and is the principal name under which our bottled beer has been bottled. We have had other labels since at different periods. We have had several bottles for "Near Beer" and we have had quite a variety of labels.

The label marked "Defendant's Exhibit D," was the first label designed for us and we used it without change to this day. During the whole life of the "Magnolia Brewery" I would say that one half of our bottle beer has been Southern Select, and one half has been divided between other bottle beers. We bottle a beer without any label that we put up in half pint bottles which are referred to as splits. At the present time I would think about 65 per cent of our bottled output is Southern Select. It is much more than half now; and it is put up in both amber and light green bottles.

Defendant offered in evidence its exhibit "C" set out at page 207, showing its expenditure for advertising.

We get our bottles second hand in Houston and from our
161 several agents from Texas who buy them from their customers. Our practice is the same as that of all other breweries in Texas. That applies to the bottles you are talking about, the green and dark bottle, but our splits we have made specially for us. They are bought from the public and returned to us. The greatest percentage of the light bottles come with Budweiser beer and of the brown bottles from the Schlitz beer. It is the custom in the State of Texas for the breweries to sell the packages or casks of ten dozen without any understanding with the customer that he will return the bottle, but usually with the understanding that he would buy the bottle back upon a certain price. The price is almost entirely uniform. The retailer gets 20 cents per dozen from the wholesaler who supplies them and the brewery pays 25 cents a dozen to the distributor. The breweries in Texas are offering as much for the bottles made imported into Texas as the brewers who ship them into Texas originally. We — usually amply supplied in this manner. We have been using amber bottles from the beginning of our business in 1893.

The percentage of our sale in beer in amber bottles has increased in the last two or three years because we are bottling our beer, the last label we selected, in dark bottles, and I am selling more of it in that manner and putting it up, preferring to put it up in the bottle. I think that the bottle protects the beer better than a light colored bottle and insures its stability and color.

We still bottle some Southern Select beer in white bottles. Approximately 15 per cent was put up here in light bottles in the last twelve months. On the light bottle we use the label which is marked "Exhibit B," and on the brown bottle we use a label with script lettering in white on a dark background.

We changed the color of the label with the color of the bottles because it is an appropriate and proper dress and a suitable dress for the bottle and we wanted to harmonize them. We did not continue using the white label on the brown bottle because we always try to improve our business and improve the quality of the beer and improve the

aspect and condition of the brewery, and try in every respect
162 to keep abreast of the times just as the general man. I determine to do so.

Exhibit E is used by the Schlitz Brewing Co. on its pint bottles and Exhibits A and F above the same labels are used by the Schlitz Br'g Co. on quart bottles. Exhibit G is a specimen of neck label used by us and Exhibit N a neck label used by Schlitz on pint bottles.

Exhibit I is the Southern Select label which was first used on the brown bottle, but abandoned shortly after; that is, we changed the "S". I received a letter addressed to our company from the attorneys of the Schlitz Br'g Co., dated September 16, 1913, and took it to our attorneys with whom I discussed the contents of the letter. This resulted in our attorneys answering that they had compared this label, and found that the letter "S" was similar.

(Letter attached to answer admitted in evidence.)

We changed the letter "S" and adopted the label "Exhibit J" and "Exhibit K" for a neck label. I do not remember when we commenced using this new label, but it was done at the proper season—probably immediately after that correspondence passed between the attorneys.

Exhibit L that you now hand me is a label we are using now. We changed the "S" again. It differs in the design with the "S" from Exhibit J. The one "S" was more ungainly and inartistic and we changed it.

Exhibit M is the neck label in keeping with what I might call who made the design.

We have conducted our efforts always, unremittingly, to accomplish the manufacture of a first class beer. We never wanted to make a cheap or common beer. We also obtained the very highest
163 standard of manufacturing beer. When we build the brewery suitable for the purpose, it was equipped with all the equipment necessary, that could be obtained without sparing cost by way of the machinery and devices that could be obtained in the world for the purpose. We have tried to get the best, skilled men anywhere in the world and I think that we have one of the best and most skillful bacteriologists in the brewery business of the United States. We obtained the best obtainable materials anywhere in the world. We buy the very best to be had in the way of malt and hops and rice. The best selected that can be obtained no matter what it costs.

Q. Do you use corn in the manufacture of beer, and if not, what do you use in its place?

A. We use corn in a form, a refined form, when it has been freed from oil, and we use rice and malt, exclusively for the manufacture of bottle beer and hops, of course, that is a necessary ingredient in the manufacture.

Q. Do all breweries use rice where you use rice, or do some use something else when you use rice?

A. I am not familiar with the materials of other breweries and

therefore I cannot tell what materials they use, except what the general information is that we are presumed to know.

Q. Did you know it to be a fact, and if you do you may say so, and if you do not, you may say you do not, that where you use rice other breweries of the country use something else?

A. I understand the question you ask, but not having been in the interior of the breweries, I cannot answer, but usually breweries do not use rice in bottle beer.

Q. Why do you use rice in bottle beer?

A. I know it to be the best material, because I know it to be, certain percentage of it, is better in order to convert it, if you have the egency of the malt. The converting is done by the malt.

The unit in selling bottled beer is a cask of ten dozen pints.

164 Our beer costs on the average of $9.00 a cask delivered, and Schlitz beer costs on the average of $9.75 delivered.

One time we sold Schlitz beer extensively in Beaumont. And then we sold it at a few other scattered places. We did not sell it generally, but we sold it at Humble, and Baporte, and I do not recall any other place except Beaumont. We did not sell in Houston.

It is not true that when we discontinued the sale of Schlitz beer we began the use of brown bottles with brown labels. That had no relation or anything to do with it. We quit handling Schlitz beer long before we thought of putting a brown label on a brown bottle. What brown bottles were available in this market we have used from the beginning.

Mr. Develliers, a former traveling salesman of ours, left our employ on the first day of December, 1913, and came in from his last trip for us on the 21st of August. The first delivery of our brown labels for our brown bottles was made to us on August 6th, 1913, and the first shipment containing bottles with brown labels was made to Mission, Texas, 40 casks, on August 12th.

Mr. Jesse Parks was employed at Mission by Mr. Develliers; that is, shipments forwarded to Mission were unloaded by him and put in the warehouse. He was not a salesman. He kept our warehouse and made shipments to customers near Mission and delivered to customers in Mission. He is no longer in our employ. We sent another man there by the name of Carlos Guerra. That was in September or October, 1913.

Pete Harlan was in the employ of our company for more than 15 years and for ten years he was our resident agent at Beaumont. In January or February of this year I dismissed him from our employ. His attitude toward our company is unfriendly. His wife and himself have filed suit against us recently in Beaumont.

Q. Did you, or any of the officers of the company, know that Mr. Harlon, or anyone else in the employ of the company, were,

165 if it was a fact, representing that the beer manufactured by the defendant could be sold unbeknown to persons for Schlitz beer?

A. Positively no, I would not countenance such conduct of that kind on the part of our representatives.

Examined by the Court:

I did not know this Mr. Perez personally. I never saw him.

Cross-examination.

By Mr. Kronshage:

The principal bottled beers on the market in the state of Texas in 1893 was "Lemp's Extra Pale", "Budweiser" made by the Anheuser-Busch Brewing Company and "Schlitz". The Pabst beer around this territory at that time was in black bottles but they were also selling in small quantities what they called "Select" in white bottles. Budweiser and "Lemp's Extra Pale" beer was in white bottles. The labels of the "Budweiser" beer had a white body color. "Lemp's Extra Pale" I think had red on it and the label had the shape of a shield. In 1893 I think it was a square label with a background of white.

In 1893 at the World's Fair at Chicago Pabst Brewing Company got a World's prize. Their trade mark consisted of a bunch of hop leaves with a red circle around it. The fact that the Pabst Brewing Company took the first prize at the Chicago Fair was prominently advertised with great publicity in the State of Texas in 1893.

Q. Is it not a fact that when we adopted this label in 1893 we sought to simulate the label and trade mark of the Pabst Brewing Company?

A. It was not.

Q. You adopted a red circle in the trade mark?

A. It is as shown in the label you hold in your hand.

Q. And you adopted the word or name for your beer
163 "Select"?

A. "Southern Select".

Q. You adopted the white label?

A. Yes, sir.

Q. And you put the words "Southern Select" upon it in ordinary script in simulation of the word "Select" on the "Pabst Select" label?

A. Not in the least degree.

Q. You put your beer in light colored bottles, did you not?

A. Yes, sir.

Q. You marketed bottled beer of the Houston Ice & Brewing Company for a period of twenty years under this white label and carrying the word "Southern Select" and bearing an alleged trade mark, the permanent feature of which is a red line.

A. We marketed the beer under the label which you hold in your hand, which is marked "Exhibit D", and we did not simulate any other beer. We marketed it for more than twenty years.

I cannot approximate how many bottles of beer we sold to the public during that period of twenty years under this label. From 1893 until August, 1913, we used several labels other than this label marked "Exhibit D". Several of these labels are not used today. Others we have used for a while and discarded.

Q. How many of these other labels have you used during these years?

A. We have used more other labels than we have of that "Southern Select" and we have sold a vast quantity of our beer without any label at all.

Q. How many different kinds of beers have you marketed and under what different names?

A. We had a brand we called "Reputation", we ran for about three years and discarded. And we have several "Near Beers" that we marketed under "Near Beer" labels.

Q. You have marketed "Southern Select" and "Reputation" Beer? Any other real beer under any other name?

A. One time we had one called "Milwaukee Exquisite" but
167 a very small quanity of that was sold because a law was enacted prohibiting using geographical names in that manner. I think that law was enacted by the United States.

Q. You know about fifteen years ago that I was going over this country and stopping breweries all over this country from using the word "Milwaukee" on any other beer when they had never seen Milwaukee?

A. I did not know you had been in this country.

Q. And that when you put "Milwaukee" on your beer you were trying to sell beer on the reputation of "Milwaukee Beer"?

A. We sold very little of that. We stopped it; and my impression is that there is a United States law on that subject.

Q. You cannot remember putting any other beer on the market except "Milwaukee Exquisite" and the other two you have named?

A. There was no other.

Q. I call your attention to a very handsome label of the Milwaukee Lithographing & Engraving Company marked in their catalogue "E-107". Did you ever run that?

A. That is not the label that we used, but we did use a beer called "Magnolia Pale". I will try to find some samples of the labels. The label we used had the words "Magnolia Pale" written right across and no design in the center of it.

Q. Will you answer positively that you never used this label marked by the stenographer "Exhibit 9"?

A. I will not swear positively but I do not recall having used another label.

Q. Why did you abandon the word-"Magnolia Pale" as the name for your beer?

A. Because we saw fit to do so.

Q. Your brewery is known as the "Magnolia Brewery"?

A. Yes, sir.

168 Q. The beer as your product is generally called "Magnolia Beer"?

A. That is generally known as the popular name of the brewery. It is pretty generally known as "Magnolia Beer."

Q. That is a good trade name?

A. We find it very much so. Yes, sir.

Q. That identifies your product very well?

A. Yes, sir.

Q. And there is no other brewery in this country that you know of that is known as "Magnolia Brewery" or that puts up "Magnolia Beer"?

A. There is no other brewery known as "Magnolia Brewery" but I have seen labels of beer bottles having "Magnolia Beer" that was not made by us.

Q. I do not remember how many of the labels marked "Exhibit I," the one we received your letter about, were used by us. We bought a million but I cannot remember using them. We stopped the use of the "S" after we received a letter from your firm. That is correct.

Q. Don't you remember that Mr. Andrews made this statement at Galveston at the time the argument was on for the temporary injunction that you still had 350,000 of these labels "Exhibit I" on hand, and that you would cease using them as soon as you finished them up?

A. I was not at the hearing but I heard Mr. Andrews make that statement yesterday.

Q. Was not that a fact, in June, 1914, you still had 350,000 of these labels on hand?

A. I don't remember whether there was or not.

By the Court: When did you discontinue using them?

A. Following I think the correspondence with these gentlemen and we stopped it.

Q. The letter that you received from us was dated September 13, 1913, was it not?

A. Yes, sir, I saw it here yesterday. That is correct.

Q. And you mean to testify now that you stopped using this label "Exhibit I" after you received that letter?

169 A. I said we stopped afterwards. I do not know how soon it was.

Q. You also knew that Mr. Andrews had given his word to the court at the hearing in June, 1914, you had stopped using this label marked Exhibit "J"?

A. My understanding now—my memory is not absolutely clear—is that this is the label we were using when the hearing was had, and of course it had been in use some time previous to that.

Q. You were advised that Mr. Andrews had promised the Court that you would not use this label Exhibit "J" from and after June, 1914?

A. No, sir, I was not. This letter—after this letter came to me, this label was not used at that time, and when Mr. Andrews first talked to me about having made that statement to the court was when he heard that I had another letter, and that I had a corrected label—I never intended to use this label because I did not like that "S" and I will have you agree that the "S" is not a good letter and ought not to be used if you would do any better. I did not know until Mr.

Andrews told me afterwards that we should have continued using it and when he presented the matter to the court he asked me about it and I said, Well, I did not know and we put on another label. I did not use that. I did not use the "S". This discussion came up with Mr. Andrews about a month later. I considered the "S" in Exhibit "L" much more artistic than in Exhibit "J".

Q. Your retail dealers dislike this "S" on Exhibit "J" and insisted on having the "S" of script?

A. The retail dealer was not consulted at all. It was done by me without consultation with anybody else.

Q. Why was it that you insisted upon having the paraph under the entire word "Select"? That paraph appears in all three labels marked "I" "J" and "L"?

A. Yes, sir. I think it is a good finish on the label. That is the reason I insisted on having it there and not for the purpose of imitating Schlitz.

Q. What was your reason in changing your color of your
170 trade mark from red as it appears in Exhibit "D" to blue as it appears in Exhibits "I", "J" and "L"? Was that artistic?

A. Well, he submitted to me his own design as you see it drawn there, and I preferred it. I did not discuss or ask how the colors should be blended.

Q. You did not tell him you wanted to have your color in the trade mark changed from red to blue because the Schlitz people in the left hand corner of their label have a blue globe?

A. I did not.

We have absolutely abandoned the particular style of lettering of the letter "S" as it appears on Exhibit "I". The lettering of "Southern Select" appearing on Exhibit "L" is very similar to the letters appearing on "Exhibit I", other than the capitals. The two capitals are different, but the smaller letters are not. These letters are well known characters and are not designed for our purpose or for yours, but are used generally. I did not understand that we were to abandon the particular kind of paraph that appears on this exhibit and I do not understand it now.

I do not remember the name of the manufacturer who made the sign you now hand me and which is marked "Complainant's Exhibit No. 10". I placed the order for the sign some four or five months ago and I have distributed a few. I think we have most of them on hand now. But we have quite a number in the barrooms of the City of Houston.

The letters appearing upon this Exhibit "10" are identical with the letters which appear on Exhibit "1". It is a duplicate of it. When I placed the order for this sign I did not have in mind a sign that the Schlitz Brewing Company had around the city of Houston of which Complainant's Exhibit "Y-2" is a sample.

I recognize this paper which you hand me as an advertisement placed by our brewery in the Houston Daily Post on March 14th,
1915. The advertisement shows a picture of a bottle of
171 Southern Select beer made by the "Magnolia" brewery and the letters appearing in the picture of the bottle are identical

with the letters which appear on the label, Exhibit "1". It is the same lettering.

Q. Now, why are you using the lettering as it appears upon the picture of this bottle in this advertisement in the Houston Daily Post, and why do you use the particular lettering which is in Exhibit "10" when you have already changed the lettering on the labels?

A. Well, it is in English and no other language. And I can conceive of nothing more honest than to advertise that label in our own name.

(Advertisement from Houston Post, March 14th, 1915, marked Complainant's Exhibit 11.)

(Certified copy of Registration of Trademark of the Houston Ice & Brg. Co. and declaration dated —— and Registration allowed under date of ——. Marked "Complainant's Exhibit 12".)

Q. I show you what purports to be certified copy of registration of trademark of the Houston Ice & Brg. Co. I call your attention to the words appearing on the second page of this document. The script in which the words "Southern Select" appear in Exhibit "12" is identical with the script as it appears upon defendant's exhibit "1", is it not?

A. Yes, sir.

Q. When you filed these words "Southern Select", together with some arboreal device in connection with it, in the Patent Office at Washington, in the particular style of script, did you, by that filing, intend to claim for yourself, the right to use that particular style of lettering on the beer "Southern Select"?

A. I did not file it myself. I know it was done because I have seen it before.

Q. You swear it to yourself?

172 A. Yes, sir.

Q. That is your declaration?

A. Yes, sir; but I did not attend to the filing of it.

Q. You swear to the declaration?

A. Yes, sir; that is the correct design, as you stated.

Redirect examination.

By Mr. Andrews:

Q. Did Pabst Brewing Co. ever say to you, or to any officers of the Houston Ice & Brewing Company, that your company had at any time infringed its label?

A. No, sir.

Q. Have you ever had the question presented to you other than in this hearing?

A. No, sir; no one has ever suggested anything of the kind before. I do not remember exactly that you advised me of any statement you had made to the court that the first brown label would be discontinued, but I knew that we had agreed to discontinue the use of

the first label, and I presume that you had stated that to the court, but I did not understand that there was any pledge made, and I understood that was the second label with a new "S". The second label we did not use, I think, for more than three months. If I may be permitted to do so, I might go further. Mr. Andrews did not know that we had these three designs in use at all and the first time it was brought to his notice he called my attention to it, and then was when I first heard of the hearing at Galveston and what occurred there, and that was the first I knew of it. I was not advised that the second brown label would be continued without change. I certainly would not have done so if I had understood it that way.

The cut for the advertisement which appeared in the Houston Post of March 14th, which contains the "S", the use of which was virtually abandoned, was made when we first began to make
173 our bottle beer and long prior to the hearing in Galveston.

The advertisement which appeared in the Houston Post of March 28th, 1915, and which is marked Exhibit "N" is a new cut and the form of the "S" has been changed.

About twelve days ago at your suggestion I wrote to every brewery in the United States as published in Toby's Directory, to send me their labels, and I handed a great many of them to you. In all of these labels you hand me, and there are several of them the paraph is exactly like that on the Schlitz Brewing Company label, and besides I know that paraph is used by many different breweries and different water bottlers and even the "S" that we abandoned has been used by a great many people. I know that.

(Labels referred to marked "Exhibit O".)

Mr. Hamilton was the father of the trademark and really put it through, although I made the affidavit. We have received a great many replies to the questions I sent out about twelve days ago and they are still coming in. I have handed you, before court this morning, quite a lot. There are about a dozen there.

The invoice of Rein & Son, dated September, 1913, for one million labels "Southern Select" and marked "Defendant's Exhibit P", for the first order of labels used. We only order labels in million lots. I have, in no instance, had any conversation with retail dealers, about the subject of changing our "S" form the one adopted
174 after the hearing at Galveston to the one now in use.

Thereupon, B. A. RANDOLPH, called on behalf of the defendant, testified as follows in answer to questions by Mr. Andrews:

I am employed by the Houston Ice & Brg. Co. as city salesman and as such visit all the barrooms in Houston including the bar in the Rice Hotel.

Bottle beer, kept for the purpose of selling over the counter, is kept in boxes at each end of the bar and these boxes are divided into compartments with lattice work, and they have two or three kinds in each box, so as to give quick service from each end of the bar. There are

several kinds of beer in the same boxes, but divided with lattice work between. One kind of beer is kept in each compartment and the same practice prevails at the Rice Hotel. I know of no place where they keep the beer together.

There were attached to depositions of E. Bielfeld and A. C. Bauman and offered in evidence in this cause the following exhibits.

Complainant's Exhibit A Patent Office Copy, statement and declaration for Registration of Globe trademark re-registered March 4, 1913. T. M. No. 90587.

UNITED STATES PATENT OFFICE.

JOS. SCHLITZ BREWING COMPANY, OF MILWAUKEE, WISCONSIN.

TRADE-MARK FOR LAGER-BEER.

90,587. Registered Mar. 4, 1913.

Application filed October 25, 1911. Serial No. 59,338.

STATEMENT.

To all whom it may concern:

Be it known that the Jos. Schlitz Brewing Company, a corporation duly organized under the laws of the State of Wisconsin, located in the city of Milwaukee, county of Milwaukee, and State of Wisconsin, and doing business at 518 Third street, in the said city, has adopted and used the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in the business of the said corporation since May 15, 1894, the said corporation being the owner of registration No. 26,885, April 9, 1895 granted to the Joseph Schlitz Brewing Company, also registrations Nos. 15,646, June 26, 1888, 52,011, May 1, 1906 and 87,489, July 16, 1912.

The particular description of goods to which the trade-mark is appropriated is lager beer in Class 48, Malt extracts and liquors.

The trade-mark is usually applied to the receptacles containing the goods by placing thereon printed labels upon which the trade-mark is shown.

JOS. SCHLITZ BREWING COMPANY,
By ROBERT A. UIHLEIN,
Secretary.

DECLARATION.

State of Wisconsin, county of Milwaukee. ss.

Robert A. Uihlein, being duly sworn, deposes and says he is secretary of the corporation, the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes said corporation to be the owner of the trade-mark sought to be registered; that no person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form, or in any such near resemblance thereto, as might be calculated to deceive, that the said trade-mark is used by the applicant in commerce among the several States of the United States; that the drawing presented truly represents the trade-mark sought to be registered and that the specimens (or fac-similes) show the trade-mark as actually used upon the goods, and that the mark has been in actual use as a trade-mark of the applicant for ten years next preceding February 20, 1905, and that, to the best of his knowledge and belief, such use has been exclusive.

ROBERT A. UIHLEIN.

Subscribed and sworn to before me this 17th day of October, A. D. 1911.

[L. s.] EDW. F. BYRON,
Notary Public, Milwaukee County, Wisconsin.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

176 Complainant's Exhibit B Patent Office Copy, statement and declaration for registration Complainant's trademark registered April 9, 1895, T. M. No. 26385 attached hereto.

TRADE MARK.

JOSEPH SCHLITZ BREWING COMPANY.

BOTTLED BEER.

No. 26,385. **Registered Apr. 9, 1895.**

WITNESSES:

PROPRIETOR:

Jos. Schlitz Brewing Co
by W. D. Fairmont
its attorney in fact

176 Complainant's Exhibit B Patent Office Copy, statement and declaration for registration Complainant's trademark registered April 9, 1895, T. M. No. 26385 attached hereto.

UNITED STATES PATENT OFFICE.

JOSEPH SCHLITZ BREWING COMPANY, OF MILWAUKEE, WISCONSIN.

TRADE-MARK FOR BOTTLED BEER.

STATEMENT and DECLARATION of Trade-Mark No. 26,385, registered April 9, 1895.

Application filed February 18, 1895.

STATEMENT.

To all whom it may concern:

Be it known that the JOSEPH SCHLITZ BREWING COMPANY, a corporation organized and existing under the general laws of the State of Wisconsin, and having its general office and place of business at the city of Milwaukee, county of Milwaukee, in said State, has adopted for its use a Trade-Mark on its Various Brands of Bottled Malt Liquors, of which the following is a full, clear, and exact specification.

Said trade mark consists of the word "Schlitz" in heavy, characteristic, white script.

This trade mark has generally been arranged in rhomboid form as shown in the accompanying fac-simile in black and white, in which the word "Schlitz" appears in characteristic lettering, slanting upward from left to right, in an oblique line, with a globe and belt, the symbol employed as the general trade mark of the applicant for years past, upon the immediate left of said word "Schlitz." The color of the back ground of the trade mark, as used with the various brands of bottled malt liquors, varies, and aims to correspond with the color of the beverage, so as to indicate at a glance the brand itself,—for example, a golden back ground being applied to light pale beer, and a darker color to dark stout beer, and the like. The various accessories which are used with the trade mark may be varied at pleasure, altogether omitted or added to without materially altering the character of the said trade mark, the essential feature of which is the word "SCHLITZ" in heavy, characteristic, white script lettering.

This trade mark has been continuously used by said corporation since the 10th day of May, 1894. The class of merchandise, to which it is appropriated, is malt liquors and the particular description of goods comprised in such class, on which it is used, is bottled beer.

It is the practice to affix said trade mark to the bottles containing such malt liquors and to the boxes and cases in which said bottles may be packed by means of suitable labels, pasted, tacked or otherwise fastened or by being printed or stenciled directly thereon.

JOSEPH SCHLITZ BREWING COMPANY,
Per AUGUST UIHLEIN,
Secy.

In presence of—
EUGENE WURSTHOFF,
S. E. ADRAMS.

DECLARATION.

State of Wisconsin, Milwaukee county, ss:

AUGUST UIHLEIN being first duly sworn deposes and says that he is one of the officers of the JOSEPH SCHLITZ BREWING COMPANY, of Milwaukee, Wisconsin, the applicant named in the foregoing statement, to wit: its secretary and makes this affidavit and declaration on behalf of said company; that he verily believes that the foregoing statement is true; that said corporation has at this time a right to the use of the trade mark therein described; that no other person or persons, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used by said corporation in commerce between the United States and foreign nations and particularly with Canada, and that the description and fac-simile herewith presented for record truly represent the trade mark sought to be registered.

AUGUST UIHLEIN.

Subscribed and sworn to before me this 21st day of December, 1894.

[L. S.] EUGENE WURSTHOFF,
Notary Public, Milwaukee Co., Wis.

177 Complainant's Exhibit C, Patent Office Copy, statement and declaration for registration of trademark registered by complainant under Act of Congress February 20, 1905, on May 1, 1906, T. M. No. 52,011, attached hereto.

UNITED STATES PATENT OFFICE.

JOSEPH SCHLITZ BREWING COMPANY, OF MILWAUKEE, WISCONSIN.

TRADE-MARK FOR LAGER-BEER.

No. 52,011. Statement and Declaration. Registered May 1, 1906.

Application filed August 4, 1905. Serial No. 13,277. Used ten years.

STATEMENT.

To all whom it may concern.

Be it known that the JOSEPH SCHLITZ BREWING COMPANY, a corporation duly organized and existing under the laws of the State of Wisconsin, and located in the city of Milwaukee, county of Milwaukee, in said State, and doing business at No. 518 Third street, in said city, has adopted for its use a trade-mark, of which the following is a description.

The trade-mark is shown in the accompanying drawing, wherein appears a rhomboidal panel bearing the word "SCHLITZ" in ornamental script type, with paraph beneath, the words "THE BEER THAT MADE MILWAUKEE FAMOUS," and the representation of a globe encircled by a belt having thereon the word "SCHLITZ."

The trade-mark has been continuously used in the business of said corporation since the 15th day of May, A. D. 1894.

The class of merchandise to which the trade-mark is appropriated is malt liquors, and the particular description of goods comprised in said class upon which said trade-mark is used is lager-beer.

The trade-mark is displayed on packages containing the goods by placing thereon a printed label on which the same is shown.

[L. S.] JOSEPH SCHLITZ BREWING COMPANY,
By AUGUST UEHLEIN,
Secretary.

DECLARATION.

State of Wisconsin, county of Milwaukee, ss:

AUGUST UEHLEIN, being first duly sworn, deposes and says that he is the secretary of the JOSEPH SCHLITZ BREWING COMPANY, a corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark either in the identical form or in such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States and between the United States and foreign nations or Indian tribes and particularly with Canada; that the description, drawing and specimens presented truly represent the trade-mark sought to be registered; and that the mark has been in actual use as a trade-mark of the applicant for ten years and more next preceding the passage of the act of February 20th, 1905, and that to the best of this affiant's knowledge and belief such use has been exclusive.

AUGUST UEHLEIN.

Subscribed and sworn to before me this 25th day of July, 1905.

[L. S.] S. E. ABRAMS,
Notary Public, Milwaukee County, Wisconsin.

POOR COPY

178 Complainant's Exhibit D. Large sized Schlitz label Exhibit to complaint.

TRADE-MARK.

No. 52,011. REGISTERED MAY 1, 1900.

JOSEPH SCHLITZ BREWING COMPANY.

LAGER BEER.

APPLICATION FILED APR. 4, 1900.

Proprietor.

Joseph Schlitz Brewing Company

by Theodore Kronshage Jr

Its attorney in fact.

78 Complainant's Exhibit D. Large sized Schlitz label Exhibit to complaint.

Complainant's Exhibit E, small size "Schlitz" label.

179 Complainant's Exhibit F, copy of brown label of "American" Brewing Company, New Orleans, no copies available.

Complainant's Exhibit G, copy of brown label, Petersen's standard beer, no copies available.

Complainant's Exhibit H, copy of brown label, Empire Beer, A. Kuhfeld, Proprietor, no copies available.

Complainant's Exhibit I, copy of brown label, white lettering and blue figure, no copies available.

Complainant's Exhibit J, copy of brown label "Scales" beer, with blue figure of horse shoe, no copies available.

Complainant's Exhibit K, copy of brown label, Eckers "Bohemian" lager, no copies available.

Complainant's Exhibit L, copy of brown label "Schultz" beer, with blue football on said label, no copies available.

Complainant's Exhibit M, copy of brown label "Special Brew". Blue picture of Chief Pocatello thereon, no copies available.

Complainant's Exhibits N & O. Two photographs each three bottles of "Blitz", three bottles of Schlitz beer, marked A. Scarboro, Beyreuth, Syria, no copies available.

Complainant's Exhibit P, J. M. C., Notary (For Identification).

During the period of time from 1901 to Dec. 31st, 1912, newspaper advertising was done in the following cities in the State of
180 Texas, the name of the paper also being given:

Austin Statesman	....	....	1903	....	....	....	....	....	....	....
Austin Tribune	1901	....	....	1904	1905	1906	1907	....	1911	1912
Beaumont Enterprise	....	....	....	1904	1905	1906	....	1908	1911	1912
Beaumont Journal	....	1902	....	1904	1905	....	....	....	....	....
Brenhan Press	....	....	....	1904	....	1906	....	....	....	....
Bryan Eagle	....	....	....	1904	....	....	....	....	....	....
Bryan Pilot	....	....	1903	....	....	....	....	....	....	....
Corpus Christi Caller and Herald	....	....	....	....	....	....	....	....	1911	1912
Cuero Record	....	....	1903	....	....	....	....	....	....	....
Dallas and Galveston News (1909)	1901	1902	1903	1904	1905	1906	1907	1908	1911	1912
Dallas Times-Herald	....	....	....	1904	....	1906	1907	....	....	....
Eagle Lake Headlight	....	....	1903	1904	....	....	....	....	....	....
El Paso Herald	....	....	....	1904	1905	....	....	....	1911	....
El Paso News	....	1902	1903	1904	....	....	1907	1908	....	....
El Paso Times	....	....	....	....	....	....	....	....	....	1912
Fort Worth Record	....	....	....	1904	....	1906	1907	1908	1911	1912
Fort Worth Record	1901	....	1903	....	....	....	....	....	....	....
Fort Worth Star	....	....	....	....	....	....	1907	1908	....	....
Fort Worth Star-Telegram	....	....	....	....	....	....	....	....	1911	1912
Fort Worth Telegram	....	1902	....	1904	1905	1906	1907	1908	....	....
Gainesville Messenger	....	....	1903	....	....	....	....	....	....	....
Houston Chronicle	1901	1902	1903	1904	1905	1906	1907	....	1911	1912
Lake Charles (La.) Press	....	....	....	1904	....	....	....	....	....	....
181 Lake Charles (La.) American	....	....	1903	....	....	1906	....	....	....	....
Laredo Times	....	....	....	....	....	....	....	....	1911	1912
Marshall News	....	....	1903	....	....	....	....	....	....	....
Palestine Herald	....	....	1903	....	....	....	....	....	....	....
Paris Advocate	....	....	1903	1904	....	....	....	....	....	....
San Angelo Standard	....	....	....	....	....	1906	....	....	1911	1912

San Antonio Express	1901	....	1903	1904	1905	....	....	....	1911	1912
San Antonio Gazette	....	....	....	....	....	....	1907	....	....	....
San Antonio Light	....	1902	....	1904	1905	....	....	1908	1911	1912
Sulphur Springs Gazette	1901	....	....	....	....	....	....	....	....	....
Taylor Journal	....	....	1903	....	....	....	....	....	....	....
Texarkana Courier	1901	....	1903	....	....	....	....	....	....	....
Victoria Advocate	....	....	....	1904	....	....	....	....	....	....
Victoria Times	....	....	1903	....	....	....	....	....	....	....
Victoria Deutsche Zeitung	....	1902	....	....	....	....	....	....	....	....
Waco Times Herald	....	....	1903	1904	....	....	1907	1908	1911	1912
Waco News	....	....	....	....	....	....	....	....	....	1912

182 Complainant's Exhibit Q for identification, J. M. C., Notary. In the years 1909 and 1910 poster advertising was done in the following cities in Texas:

Amarillo	....	1910
Austin	1909	1910
Ballinger	1909	1910
Beaumont	1909	1910
Beeville	1909	1910
Brenham	....	1910
Bryan	1909	1910
Corpus Christi	....	1910
Cuero	....	1910
Dalhart	1909	....
Dallas	....	1910
Eagle Pass	....	1910
El Paso	1909	1910
Fort Worth	1909	1910
Gainesville	1909	1910
Galveston	1909	1910
Henrietta	1909	1910
Houston	1909	1910
Humble	....	1910
La Grange	....	1910
Laredo	1909	1910
Lufkin	1909	1910
Marlin	....	1910
Mineral Wells	1909	1910
Navasota	....	1910
Orange	1909	1910
Palestine	1909	1910
Port Arthur	1909	1910
San Angelo	1909	1910
San Antonio	1909	1910
Sequin	....	1910
Temple	....	1910
Texarkana	1909	....
183 Victoria	....	1910
Waco	1909	1910
Wichita Falls	1909	1910

The total cost of this advertising during the year 1909 was $2,756.88, and for the year 1910, $3,087.84.

Poster Advertising in Texas Cities.

	1909	1910
Amarillo	$.....	$30.24
Austin	117.60	117.60
Ballinger	35.28	.....
Beaumont	201.60	201.60
Beeville	23.52	23.52
Benham	.....	23.52
Bryan	23.52	23.52
Corpus Christi	.....	42.14
Cuero	.....	23.52
Dalhart	362.88	.....
Dallas	.....	362.88
Eagle Pass	.....	23.52
El Paso	120.96	141.12
Fort Worth	241.92	241.92
Gainesville	47.04	70.56
Galveston	241.92	241.92
Henrietta	23.52	23.52
Houston	362.88	362.88
Humble	.....	26.88
La Grange	.....	22.54
Laredo	82.32	82.32
Lufkin	35.28	23.52
Marlin	.....	23.52
Mineral Wells	35.28	35.28
Navasota	.....	29.40
Orange	23.52	23.52
	$1,979.04	$2,256.24

	1909	1910
Brt. fwd.	1,979.04	2,256.24
Palestine	58.80	67.20
Port Arthur	58.80	58.80
San Angelo	47.04	47.04
San Antonio	362.88	362.88
Sequin	.....	26.88
Temple	.....	23.52
Texarkana	75.60	.....
Victoria	.....	23.52
Waco	151.20	151.20
Wichita Falls	23.52	70.56
	$2,756.88	$3,087.84

Magazines—	Used during year.					
Advanced Therapeutics, New York, N. Y.	....	....	....	....	1908	1909
Ainslee's New York, N. Y.	....	....	1906	1907	1908	1909
American Illustrated, New York, N. Y.	....	....	....	....	....	1907
Amer. Journal of Clinical Medicine, Chicago, Ill.	....	....	....	....	....	1907
Argosy, New York, N. Y.	....	....	....	....	1908	1909
Army & Navy Journal, New York, N. Y.	....	....	....	....	1911	1912
Army & Navy Register, Washington, D. C.	....	....	....	....	1911	1912
Associated Sunday Magazine, New York, N. Y.	....	....	....	....	....	1909
Black Cat, Boston, Mass.	....	....	....	....	1906	1907
Collier's Weekly, New York, N. Y.	....	....	....	....	....	1905
Cosmopolitan, New York, N. Y.	....	....	1906	1907	1908	1909
Everybody's, New York, N. Y.	....	....	....	....	1908	1909
Field and Stream, New York, N. Y.	....	....	....	1905	1908	1909
Four Track News, New York, N. Y.	....	....	....	....	1906	1907
Golf, New York, N. Y.	....	....	....	....	....	1905
Golfer's Magazine, New York, N. Y.	....	....	....	....	1905	1906
Harper's Magazine, New York, N. Y.	....	....	....	....	....	1906
Harper's Weekly, New York, N. Y.	....	....	....	....	....	1906
Journal of the Amer. Medical Ass'n., Chicago, Ill.	....	....	....	....	....	1907
Journal Mil. Serv. Inst., Governor's Island, New York	....	....	1906	1907	1908	1909
Judge, New York, N. Y.	1906	1905	1907	1908	1911	1912
Magazine of Fun, New York, N. Y.	....	....	....	....	1907	1908

186	Judge's Library & Sis Hopkins, New York, N. Y.	....	....	....	....	....	1906
	Leslie's Magazine, New York, N. Y.	....	....	....	....	....	1905
	Leslie's Weekly, New York, N. Y.	....	....	1905	1906	1907	1908
	Life, New York, N. Y.	....	....	1906	1908	1911	1912
	Medical Herald, St. Joseph, Mo.	....	....	....	....	1908	1909
	Metropolitan, New York, N. Y.	....	....	....	....	....	1906
	Munsey's New York, N. Y.	....	....	....	....	1908	1909
	Northwestern Sportsman, Milwaukee, Wis.	....	....	....	....	....	1906
	Outdoor Life, Denver, Colo.	....	....	....	....	1908	1909
	Outer's Book, Milwaukee, Wis.	....	....	....	1907	1908	1909
	Outing, Deposit, N. Y.	....	....	....	....	1906	1907
	Pearson's Magazine, New York, N. Y.	....	1905	1906	1907	1908	1909
	Puck, New York, N. Y.	....	....	....	....	....	1906
	Reader Magazine, Indianapolis, Ind.	....	....	....	....	1907	1908
	Red Book, Chicago, Ill.	....	....	....	....	1908	1909
	Rider and Driver, New York, N. Y.	....	....	....	....	....	1905
	Scribner's New York, N. Y.	....	....	....	....	....	1906
	Smart Set, New York, N. Y.	....	....	....	....	1905	1906
	Strand and Wide World, New York, N. Y.	....	....	....	1905	1908	1909
	Surgery, Gynecology & Obstetrics, Chicago, Ill.	....	....	....	1907	1908	1909
	Theatre, New York, N. Y.	....	....	1906	1907	1908	1909
	Town & Country, New York, N. Y.						
	What to Eat, Chicago, Ill.	....	....	....	....	1906	1907
	World's Work, New York, N. Y.	....	....	....	....	....	1906

HENRY UIHLEIN, Pres.
EDWARD G. UIHLEIN, Vice Pres.

ALFRED UIHLEIN, Vice Pres.
JOS. E. UIHLEIN, Vice Pres. & Gen. Manager.

ROBERT UIHLEIN, Secy.
WM. B. UIHLEIN, Gen. Superintendent.

Sold to _____

_____

RULES AND REGULATIONS.

The attention of all parties dealing with the Jos. Schlitz Brewing Company, is called to the following by-laws, rules and regulations:

AUTHORITY OF AGENTS.—No one can bind this company or contract any debt on its behalf unless a general officer of the company, or specially authorized by resolution of the board of directors.

SALE AND DELIVERY.—No order or agreement for the purchase of beer will be considered as binding upon this company until received and accepted at the general office in Milwaukee. All sales of beer, however ordered, delivered or paid for, are understood and agreed to be made and fully consummated at Milwaukee, Wisconsin. All shipments will be made f. o. b. Milwaukee, and are at the risk of the purchaser from the moment when delivery is made to a regular common carrier.

RETURN OF EMPTY PACKAGES.—The kegs and barrels in which the beer is sold invariably remain the property of the Brewing Company. The use thereof for any purpose other than holding beer constitutes conversion or larceny of the same. Such kegs and barrels must be shipped by the purchaser f. o. b. on cars at his place of residence, consigned to the Brewing Company at Milwaukee, within a reasonable time. The Brewing Company will pay return freight. This rule, however, does not apply to empty bottles and cases, but if these are returned the value thereof will be credited, less freight.

TERMS OF SALE.—All claims, whether for loss, deterioration or other causes, unless presented within one week after receipt of goods shall be deemed waived; and whenever the purchaser suspends payment, or his usual place of business becomes closed by legal process or voluntary conveyance, his whole indebtedness shall become immediately due and payable, although the original sale may have been made on credit or notes given in settlement of account.

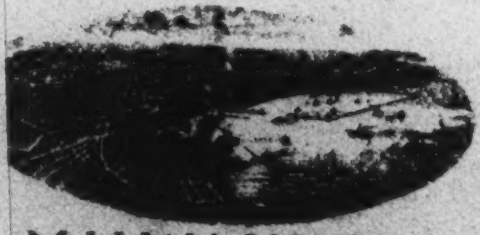
By order of the Board of Directors,

ROBERT UIHLEIN, Secretary.

137 Complainant's Exhibits S, T, U, V and W, copies of various letter heads used by complainant, all bearing fac-simile copy in miniature of complainant's brown label. (Only one copy will be attached for brevity.)

188 Complainant's Exhibit X. A copy of envelope used by complainant showing fac-simile in miniature of complainant's brown label.

MILWAUKE
FAMO



MILWAUKEE

COPY BOUND CLOSE IN CI

9 Complainant's Exhibit Y, Plaque, picture of Smithy with poster of bottle in colors showing label in colors on open door, tle about quart size, filed with clerk.

Complainant's Exhibit Y2, glass wall sign with brass back, being y of brown label in colors, filed with clerk.

Complainant's Exhibit Y3, wall sign blue globe with red belt and rds "trademark" on end of belt. Below picture of brown label colors, filed with clerk.

Complainant's Exhibit Y4, quart sized bottle on glass sign with ire of woman with wings on pedestal behind, filed with clerk.

Complainant's Exhibit Y5, Black metal sign on easel being picture rown label in colors, filed with clerk.

Complainant's Exhibit Y6, Glass blue background easel sign with roduction of brown label and all its features in color, filed with k.

Complainant's Exhibit Y7, glass sign picture in colors of bottle litz beer in colors showing label in colors, filed with clerk.

Complainant's Exhibit Y8, corner glass sign, bottle of Schlitz beer olors, showing color of brown label, filed with clerk.

Complainant's Exhibits Y-1, Y-2, Y-3, Y-4, Y-5, Y-6, Y-7, Y-8. se signs and plaques filed with clerk, to be transmitted with rd.

omplainant's Exhibit Z attached hereto.

Statement of Number of Cars and Half Cars Shipped for Account of Houston Ice & Brg. Co. to the Following Towns:

Town:	1900	1902	1903	1904	1905	1906	1907	1908	1909	1910	1911	1912	Total
Beaumont	1	22	44	45	46	57	49	35	27	24	2	..	352
Jennings, La.	..	..	2	..	4	7	22	..	..	..	..	..	15
Sour Lake	..	..	4	4	6	16	9	1	6	3	..	..	49
Galveston	..	..	1	..	..	..	..	..	..	..	..	..	1
Nome	..	..	1	..	..	..	..	..	..	..	..	..	1
Lake Charles, La.	..	..	3	16	24	22	23	10	..	..	..	..	98
Saratoga	..	..	..	13	4	3	..	..	..	..	..	..	20
Marshall	..	..	..	3	4	5	6	6	7	..	..	..	31
Humble	..	..	..	1	25	16	13	11	13	11	8	2	100
Dayton	..	..	..	..	3	8	10	2	..	..	..	..	23
Sabine Pass	..	..	..	..	..	1	4	1	1	..	..	..	7
Bartlett	..	..	..	..	..	1	..	..	..	..	..	..	1
Houston	..	..	..	..	..	1	..	..	..	..	..	..	1
Bryan	..	..	..	..	..	9	10	5	..	2	1	..	27
LaPorte	..	..	..	..	..	7	9	3	..	..	6	4	29
Longs	..	..	..	..	..	1	..	..	..	..	..	..	1
Yoakum	..	..	..	..	..	2	..	..	..	..	..	..	2
Silsbee	..	..	..	..	..	7	3	..	1	1	..	..	12
Navasota	..	..	..	..	..	3	7	7	7	3	..	..	27
Seabrook	..	..	..	..	..	1	..	..	..	..	..	..	1
Village	..	..	..	..	..	1	3	..	..	..	..	..	4
Kountze	..	..	..	..	..	1	2	..	..	..	..	..	3
Taylor	..	..	..	..	..	1	6	..	..	..	..	..	7
Teague	..	..	..	..	..	..	3	..	..	..	..	..	3
Mexico	..	..	..	..	..	..	2	..	..	..	..	..	2
Total	1	22	55	82	116	170	161	82	62	43	17	6	817

192 Complainant's Exhibit AA, copy of defendant's first alleged infringing label attached hereto.

Omitted from the printed record, being identical with Exhibit "C" to Bill of Complaint, heretofore copied at page 17.

Complainant's Exhibits BB, BB-1, BB-2, BB-3, proofs of magazine advertisements, no copies.

Complainant's Exhibits CC, CC-1, CC-2, CC-3, CC-4, proofs of newspapers advertisements, no copies.

Complainant's Exhibit DD "Beware of Imitations" circular sent out by complainants, no copies.

Complainant's Exhibit EE, complainant's dark brown label.

193 Complainant's Exhibit FF, defendant's label with white background and black script lettering.

194 DEFENDANT'S EXHIBIT 2 IN EVIDENCE. J. M. C., NOTARY.

Newspaper Advertising Done in the State of Texas From 1901 to December 31st, 1912.

Austin—Statesman,	$1,868.28	
Tribune,	81.61	
		$1,950.89
Beaumont—Enterprise,	1,581.03	
Journal,	224.70	
		1,805.73
Brenham—Press,	25.86	25.86
Bryan—Eagle,	20.80	
Pilot,	15.44	
		36.24
Corpus Christi—Caller & Herald,	337.02	337.02
Cuero—Record,	35.18	35.18
Dallas & Galveston—News	11,907.70	
(Dallas) Times-Herald,	787.95	
		12,695.65
195 Eagle Lake—Headlight,	9.88	9.88
El Paso—Herald,	257.94	
News,	306.57	
Times,	403.27	
		967.78
Fort Worth—Record,	3,232.90	
Register,	333.69	
Star,	636.92	
Star-Telegram,	1,448.50	
Telegram,	1,709.68	
		7,362.14
Gainesville—Messenger,	56.95	56.95
Houston—Chronicle,	3,892.36	
Post,	4,437.54	
		8,329.90
Lake Charles (Louisiana)—Press,	24.66	
American,	180.48	
		205.14
Laredo—Times,	291.66	291.66
Marshall—News,	37.97	37.97
Palestine—Herald,	32.60	32.60
Paris—Advocate,	82.59	82.59
196 San Angelo—Standard,	470.36	470.36
San Antonio—Express,	2,690.73	
Gazette,	264.78	
Light,	1,909.41	
		4,864.92
Forwarded		$39,598.46

(Page 2., Cond't.)		
Forwarded		$39,598.46
Sulphur Springs—Gazette,	5.50	5.50
Taylor—Journal,	17.71	7.71
Texarkana—Courier,	42.66	42.66
Victoria—Advocate,	20.02	
Times,	32.20	
Deutsche Zeitung,	11.00	
		63.22
Waco—News,	8.45	
Times-Herald,	1,392.76	
		1,402.21
Grand Total		$41,129.76

197 On the trial of said cause, Complainant's exhibits were marked and remarked as follows, to-wit:—

Complainant's Exhibit "1" T. M. No. 90587, March 4, 1913. Patent Office copy of re-registration of "Globe" trade mark, of complainant, Complainant's Exhibit "A" to deposition of E. A. Bielfeld.

Complainant's Exhibit "2" T. M. No. 52,011, May 1, 1906, in connection with complainant's amended complaint filed February 6, 1915, also Exhibit "B" to Mr. Bielfeld's deposition.

Complainant's Exhibit "3" T. M. No. 26,385, April 9, 1895, attached to complainant's amended complaint, filed February 6, 1915, also Exhibit "C" to Mr. Bielfeld's deposition.

Complainant's Exhibit "4," pint dark amber or brown glass bottle having attached thereon brown label, used for time by Schober Ice & Brewing Company, filed with clerk.

Complainant's Exhibit 5 T. M. No. 15,646, June 26, 1888, Patent Office copy of original registration of "Globe" trade mark used by complainant in connection with the marketing of its beer.

198

TRADE-MARK.

JOSEPH SCHLITZ BREWING COMPANY.

BEER.

No. 15,646. Registered June 26, 1888.

Witness
H. Kinney.
Agent Patent

Jos. Schlitz Brewing Co.
By Ernest Bruncken
his Atty

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UNITED STATES PATENT OFFICE.

JOSEPH SCHLITZ BREWING COMPANY, OF MILWAUKEE, WISCONSIN.

TRADE-MARK FOR BEER.

STATEMENT and DECLARATION of Trade-Mark No. 15,646, registered June 26, 1888.

Application filed May 19, 1888.

STATEMENT.

To all whom it may concern:

Be it known that the JOSEPH SCHLITZ BREWING COMPANY, a corporation organized under the laws of Wisconsin, and located and having its principal place of business at Milwaukee, in the county of Milwaukee and State of Wisconsin, has adopted for its use a Trade-Mark for Beer in Casks, Barrels, Kegs, Bottles, and Packages, of which the following is a full, explicit, and exact specification.

The trade-mark consists of a miniature representation of the world, being in detail a sphere or globe, which has thereon lines about the sphere, crossing each other at right angles, representative of the lines of latitude and longitude, and dark and light portions, representing land and water; also, adjoining this sphere and about portions of it are light and dim representations of fleecy clouds to further make up a representation of the world. About the sphere or globe, nearly centrally, is the representation of a band or belt fastened by a buckle, through which one end of the band passes and extends free therefrom a little distance, on which free end are the words "Trade Mark," and on and within the limits of said belt, upon the front of the globe or sphere, is the word "Schlitz" in large and distinct but somewhat ornate letters.

The essential features of this trade-mark are the representation of the globe of the world with a belt or band about it secured by a buckle.

This trade-mark has been in use in the business of said corporation since May 1, 1888.

The class of merchandize to which this trade-mark is appropriated is beer, and the particular description of goods comprised in such class on which the said trade-mark is used is beer in casks, barrels, kegs, bottles, and packages.

It is the practice to attach said trade-mark to the casks, barrels, kegs, bottles, and packages of beer by attaching thereto a slip or piece of paper or other material on which said trade-mark is printed.

[L. S.] JOS. SCHLITZ BREWING CO.
HENRY UIHLEIN,
Prest.

In presence of—
PAUL BODENBACH,
WM. ZIMMERMEYER.

DECLARATION.

State of Wisconsin, county of Milwaukee, ss:

AUGUST UIHLEIN, being duly sworn, deposes and says that he is the secretary of the JOSEPH SCHLITZ BREWING COMPANY, the corporation named in the foregoing statement; that he verily believes that the foregoing statement is true; that said corporation has at this time a right to the use of the trade-mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce with foreign nations, and particularly with the Republic of Mexico, the Dominion of Canada, and the Kingdom of Great Britain and Ireland, and that the description and fac-simile presented for record truly represent the trade-mark sought to be registered.

AUGUST UIHLEIN.

Subscribed and sworn to before me, at Milwaukee, Wisconsin, this 15th day of May, 1888.

[L. S.] GEO. H. WAHL,
Notary Public, Milwaukee Co., Wis.

POOR COPY

199 Complainant's Exhibit 6 T. M. 87,489, July 16, 1912, Patent Office copy, re-registration of certain features of complainant's label.

UNITED STATES PATENT OFFICE.

JOS. SCHLITZ BREWING COMPANY, OF MILWAUKEE, WISCONSIN.

TRADE-MARK FOR LAGER-BEER.

87,489. Registered July 16, 1912.

Application filed October 26, 1911. Serial No. 60,397.

STATEMENT.

To all whom it may concern:

Be it known that the JOS. SCHLITZ BREWING COMPANY, a corporation duly organized under the laws of the State of Wisconsin, located in the city of Milwaukee, county of Milwaukee, and State of Wisconsin, and doing business at 518 Third street, in the said city, has adopted and used the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in the business of the said corporation since May 15, 1894.

Applicant is the owner of registration 8,369, dated June 14, 1881, and registration 26,285, dated April 9, 1889.

The particular description of the goods to which the trade-mark is appropriated is lager beer, in Class 46, Malt extracts and liquors.

The trade-mark is usually applied to the receptacles containing the goods by placing thereon printed labels upon which the trade-mark is shown.

JOS. SCHLITZ BREWING COMPANY,
By ROBERT A. UIHLEIN,
Secretary.

DECLARATION.

State of Wisconsin, county of Milwaukee, ss.

ROBERT A. UIHLEIN, being duly sworn, deposes and says he is secretary of the corporation, the applicant named in the foregoing statement; that he believes that the foregoing statement is true; that he believes said corporation to be the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark, either in the identical form, or in any such near resemblance thereto, as might be calculated to deceive; that the said trade-mark is used by the applicant in commerce among the several States of the United States; that the drawing presented truly represents the trade-mark sought to be registered and that the specimens (or fac-similes) show the trade-mark as actually used upon the goods, and that the mark has been in actual use as a trade-mark of the applicant for ten years next preceding February 20, 1905, and that, to the best of his knowledge and belief, such use has been exclusive.

ROBERT A. UIHLEIN.

Subscribed and sworn to before me this 17th day of October, A. D. 1911.

[L. S.] EDW. F. BYRON,
Notary Public, Milwaukee County, Wisconsin.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

No. 87,489 U. S. Patent Office.

200 Complainant's Exhibit 7 Milwaukee Lithographing & Engraving Company catalogue to be transmitted with physical exhibits, because impractical to attach to record.

Complainant's Exhibit 8 Milwaukee Lithographing Company catalogue, to be transmitted with physical exhibits, because impractical to attach to record.

Complainant's Exhibit 9 E 107 Magnolia Pale label in Milwaukee Lithographing & Engraving Company's catalogue. Reference to label in Exhibit "7" supra of which no copies available.

Complainant's Exhibit 10 Brown glass sign, Southern Select. This is transmitted with record and incapable of being printed with record, but filed with clerk.

Complainant's Exhibit 11 Page of Houston Daily Post, March 14, 1915. This is out of print and sufficient copies to put into the record not available. See stipulation for transmittal of original with physical exhibits.

Complainant's Exhibit 12 Certified Patent Office copy of Registration T. M.—Houston Ice & Brewing Company No. 102,895, March 2, 1915.

UNITED STATES PATENT OFFICE.

HOUSTON ICE & BREWING CO., OF HOUSTON, TEXAS.

TRADE-MARK FOR BOTTLED BEER.

102,895. Registered Mar. 2, 1915.

Application filed May 21, 1914. Serial No. 72,402.

STATEMENT.

To all whom it may concern:

Be it known that the Houston Ice & Brewing Co., a corporation duly organized and existing under and by virtue of the laws of the State of Texas, and located in the city of Houston, county of Harris, in said State, and doing business in the city of Houston and State of Texas, has adopted and used the trade-mark shown in the accompanying drawing, no claim being made to the exclusive use of the word "Select", for bottled beer, Class 48, Malt extracts and liquors.

The trade-mark has been continuously used in the business of said corporation since the month of May, 1892.

The trade-mark is applied or affixed to the goods, or to the packages containing the same, by placing thereon a printed label on which the trade-mark is shown.

[L. S.] HOUSTON ICE & BREWING CO.
By R. L. AUTREY,
Vice President.

DECLARATION.

The State of Texas, county of Harris, ss.

R. L. Autrey, being duly sworn, deposes and says that he is the vice president of the Houston Ice & Brewing Co., a corporation duly organized under and by virtue of the laws of the State of Texas, and the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes that said corporation is the owner of a trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the right to use said trade-mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States and between the United States and foreign nations, and particularly with the Republic of Mexico; that the description and drawing presented truly represent the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

R. L. AUTREY.

Subscribed and sworn to before me, a notary public in and for Harris county, Texas, this 14th day of November, 1914.

[L. S.] AGNES E. BROWN,
Notary Public.

Copies of this trade-mark may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

202 Complainant's Exhibit 14 Quart Southern Select, 1st label. This exhibit is transmitted with record and filed with clerk, being bottle of beer it is incapable of being printed in the record.

Complainant's Exhibit 15 Quart Southern Select—2nd label. This exhibit is transmitted with record and filed with clerk, being bottle of beer it is incapable of being printed in record.

Complainant's Exhibit 16 Certified copy Injunction, Joseph Schlitz Brewing Company—N. G. Franklin, etc., filed October 20, 1908, filed with clerk under stipulation to be transmitted with record.

Complainant's Exhibit 17 Certified copy Writ of Injunction—Joseph Schlitz Brewing Company vs. Interboro Brewing Company, Inc., served February 6, 1915, filed with clerk under stipulation, to be transmitted with record.

Def't's Ex. "A."

Beer Brewed.

Houston Ice & Brewing Company.

	Barrels.	
1893	25,738	
1894	42,424	
1895	49,045	
1896	55,482	
1897	59,149	
1898	59,833	
1899	65,226	
1900	71,780	
1901	86,460	515,137
1902	85,495	
1903	84,715	
1904	99,190	
1905	93,950	
203 1906	116,290	
1907	129,780	
1908	117,484	
1909	126,258	
1910	134,885	
1911	156,870	
1912	154,313	
1913	183,620	
To Oct. 21st.		
1914	156,666	1,639,516
Houston Ice & Brewing Ass'n, Oct. 22 to Dec. 31st.		
1914	21,334	21,334
Barrels brewed		2,175,987

No. 44 Eq.

Filed 23rd Day of July, 1915. L. C. Masterson, *Clerk.*

	Keg beer, barrels.	Selling price.	Bottle beer, barrels.	Selling price.	Total barrels.	Total selling price.
1893	18,162¼	20,752,405	382	586,753	18,544¼	21,339,158
1894	37,035	28,201,292	2,340	4,633,599	29,375	32,834,891
1895	43,146	31,968,944	2,752	5,931,592	45,898	37,900,536
1896	49,528	36,107,576	2,778	5,684,315	52,316	41,791,891
1897	54,810¼	38,504,831	2,617	5,501,353	57,427¼	44,006,184
1898	54,115¾	39,311,466	2,766	5,538,969	56,881¾	44,850,435
1899	59,491½	48,045,306	2,975	6,406,481	62,466½	54,451,787
1900	62,971¼	50,674,195	3,477	7,381,590	66,448¼	58,055,785
1901	77,067¼	54,773,047	4,769	10,351,551	81,836¼	65,124,598
	456,327½	348,339,062	24,866	52,016,203	481,193½	400,355,265
1902	77,720	58,386,385	5,185	9,752,330	82,905	68,138,755
1903	73,140¼	54,222,216	7,140	11,945,118	80,280¼	70,167,334
1904	78,662¼	58,442,664	10,185¼	22,998,965	88,847½	81,441,629
1905	82,186	60,909,866	9,720¾	24,847,856	91,906¾	85,757,722
1906	96,188¼	71,636,865	12,300¼	34,063,978	108,488½	105,700,843
1907	104,022½	76,705,248	17,064	49,910,592	121,086½	126,660,840
205						
1908	95,719	69,591,492	15,893	51,933,933	110,612	121,525,425
1909	104,546¾	77,937,856	16,021	36,731,160	120,567¾	114,669,016
1910	110,594¼	82,265,842	19,532	44,110,442	130,126¼	126,376,284
1911	123,967	91,298,598	23,971	54,031,455	147,938	145,330,053
1912	123,121¼	90,615,964	27,022	62,412,387	150,143¼	153,028,351

1913.....	135,616	99,278,598	33,271	75,759,120	168,887	175,037,718
To Oct. 21st. 1914.....	115,426¾	84,597,522	29,471	68,214,939	1,444,897¾	152,812,461
	1,319,910¼	975,934,116	226,776¼	550,712,315	1,246,686½	1,526,646,431
Houston Ice & Brewing Ass'n. Oct. 22 to Dec. 31st. 1914.....	17,786	13,781,995	3,890	9,656,248	21,676	23,438,243
	1,794,023¾	1,338,055,173	255,532¼	612,384,766	2,049,556	1,950,459,939

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Recapitulation.

1893 to 1901 keg beer.....		456,327½	348,339,062
1893 to 1901 bottle beer.....		24,866	520,162,033
1902 to 1914 keg beer.....		1,319,910¼	975,934,116
1904 to 1914 bottle beer.....		226,776¼	550,712,315
Oct. 22 to Dec. 31st. 1914	keg beer.....	17,786	13,781,995
1914	bottle beer.....	3,890	9,656,248
		2,049,556	1,050,439,939

No. 44 Eq.

Filed 23rd day of July, 1915.

L. C. MASTERSON, *Clk.*

207 DF'T'S EX "C."

Expenditures for Advertising.

By Houston Ice & Brewing Co.

Year of 1905	1,536,154
Year of 1906	525,493
Year of 1907	754,452
Year of 1908	1,409,195
Year of 1909	1,157,073
Year of 1910	1,560,038
Year of 1911	1,468,456
Year of 1912	1,010,407
Year of 1913	1,300,445
Up to Oct. 21st. Year of 1914	1,168,112
Total	11,889,830

By Houston Ice & Brewing Ass'n.

Oct. 22nd. to Dec. 31, 1914	418,316
Jan. and Feb., 1915	156,650
	574,966
Total for Jan. 1st., 1905 to Mar. 1st, 1915	12,464,796

No. 44 Eq.

Filed 23rd day of July, 1915. L. C. Masterson, Clk.

208 Defendant's Exhibit "D" Southern Select neck and body white label.

Defendant's Exhibit "E" Schlitz Pint Label. This is identical with compainant's Exhibit "E" admitted with E. Bielfeld's deposition not again repeated here.

Defendant's Exhibit "F" Schlitz quart label. This is identical with Complainant's Exhibit "D" admitted with Mr. Biefeld's deposition, not again repeated.

Defendant's Exhibit "G" First Southern Select neck label. This is identical with Exhibit "E" attached to defendant's answer.

209 Defendant's Exhibit "H" Schlitz crescent neck label, this is identical with defendant's Exhibit "D" attached to the answer.

Defendant's Exhibit "I" First Southern Select brown label, the same as complainant's Exhibit "AA" admitted with E. Bielfeld's deposition and not again repeated.

Defendant's Exhibit "J" Second Southern Select label, being identical with defendant's Exhibit "J" attached to answer.

Defendant's Exhibit "K" Second Southern Select neck label, being identical with defendant's Exhibit "K" attached to answer.

Defendant's Exhibit "L" Third Southern Select label.

210 Defendant's Exhibit M, Final Southern Select neck label.

Defendant's Exhibit N, Houston Daily Post—Sunday Morning, March 28, 1915, no additional copies available, original to be transmitted by stipulation.

Defendant's Exhibit O, page of labels. No copies available, original to be transmitted by stipulation.

Defendant's Exhibit P, Bill Rein & Sons Co. 9/11/13—1,000,000. Southern Select brown labels, no copy with complainant, original transmitted with record by stipulation.

Defendant's Exhibit Q. Receipt for labels, etc., no copy with complainant, original transmitted with record by stipulation.

Defendant's Exhibit R, Pint bottle Southern Select, first label, transmitted with record and filed with clerk, by stipulation.

Defendant's Exhibit S. Quart bottle Schlitz, transmitted with record and filed with clerk by stipulation.

Defendant's Exhibit T. Bottle with second Southern Select label, attached, transmitted with record and filed with clerk by stipulation.

211 Defendant's Exhibit U. Clear glass Southern Select—white label, same as Exhibit "E" to Complainant's complaint, filed with clerk by stipulation.

Defendant's Exhibit V. New Southern Select bottle with label thereon.

Defendant's Exhibit W, Pint Schlitz (being Exhibit "B" to plaintiff's complaint), transmitted with record and filed with clerk by stipulation.

Defendant's Exhibit X—bottle of dark amber or brown glass with label, Roby Beer, Tampa, Fla.

Defendant's Exhibit Y—Pint brown bottle, having attached brown label, Brigg's Beer.

Defendant's Exhibit Z, Southern Select carton, transmitted with record and filed with record—not printed.

Defendant's Exhibit AA, white and gold label Magnolia Pale beer.

Defendant's Exhibit BB, New Schlitz Neck Label.

212 Thereupon on the 23rd day of July, 1915, there was deposited in the office of the clerk of this court, eleven exhibits offered in evidence by the plaintiff and nineteen exhibits offered in evidence by the defendant.

Thereupon counsel for the several parties filed with the judge of this court a transcript of the testimony taken in *upon* court, transcribed by the official reporter and their briefs in said cause, and the court took said matter under advisement and

Thereafter and on the 11th day of April, 1916, the court having announced his decision to award judgment to the defendants dismissing the bill of complaint of the complainant herein, a decree in that behalf was duly entered by this court.

And on the same day solicitor for the complainant, having announced his intention to appeal from the judgment of this court dismissing the said bill, an order was made and entered by this court allowing to the complainant sixty days from and after the adjournment of said court within which to perfect its appeal.

Thereafter and on the 15th day of April, 1916, said court duly adjourned.

Thereafter and on the 14th day of June, 1916, counsel for the complainant, having petitioned for further time within which to perfect its appeal, the court thereupon extended said time within which complainant might perfect its appeal to sixty days from and after the said 14th day of June, 1916.

Forasmuch as the foregoing matters and proceedings do not appear of record herein,

It is ordered and decreed by the Court that the same be now and hereby are made part of the record in said cause for the pur-
213 poses of said appeal of the complainant, Joseph Schlitz Brewing Company, and that the clerk of this court incorporate into the transcript of the record of this cause to be certified to the said United States Circuit Court of Appeals for the Fifth Judicial Circuit of the United States upon said appeal of Joseph Schlitz Brewing Company, the above and foregoing certificate and the copies of each and all of the affidavits, records, certified copies and documents hereinbefore mentioned and recited, all appearing from the clerk's equity docket to have been filed in this cause, as well as the physical exhibits offered and received in evidence in this cause, to each and all of which reference is hereby made, and each of the same is hereby made a part hereof with like effect as though each of the same had been incorporated herein, and

It is further ordered and decreed that the said clerk do certify copies of each of the same to the said United States Circuit Court of Appeals, and that the said clerk transmit to and file with said United States Circuit Court of Appeals the physical exhibits heretofore filed herein in this cause, in order that said court may review the proceedings had herein and the orders and decree entered herein on the 11th

day of April, 1916, upon the said appeal of Joseph Schlitz Brewing Company.

W. T. BURNS,
United States District Judge in and for the Southern District of the State of Texas.

Dated, Houston, Texas, Aug. 10, 1916.

Received a copy of the attached certificate of evidence this 31st day of July, 1916.

JESSE ANDREWS,
WALTER H. WALNE,
Solicitors for the Defendants Herein.

The foregoing Certificate of Evidence and Exceptions, prepared under Equity Rules, was on this the 9th day of August, 1916, presented to me, also an agreement and stipulation signed by Counsel of Record for both plaintiff and defendants waiving the setting
214 of a time and date for the presentation for approval of said Certificate of Evidence and Exceptions, and waiving notice of such presentation and it also being shown and made known to me by said agreement that Counsel for both plaintiff and defendants had agreed that said Certificate of Evidence and Exceptions were correct and had been approved by the parties through their counsel, and waiving the presence of counsel for both plaintiff and defendants, the said Certificate of Evidence and Exceptions are now here approved by the Court as being a correct certificate of Evidence and Exceptions, of the proceedings had upon the trial of said cause, and the Clerk of the District Court of the United States for the Southern District of Texas, sitting at Houston, Texas, will transmit a copy thereof, as provided under the rules for making up the record for appeal as though Rule 75 had been fully complied with in all respects.

Witness my hand this the 10th day of August, A. D., 1916.

W. T. BURNS,
Judge of the District Court of the United States for the Southern District of Texas.

O. K.
WALNE.

215 *Complainant's Assignment of Errors.*

Filed August 2, 1916.

In the District Court of the United States for the Southern District of Texas.

In Equity. No. 44.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, James H. Studdert, Jesse Andrews, Joseph F. Meyer, B. A. Riesner, and D. Rossi, as Trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, and otherwise, as successors and assigns of the said Houston Ice & Brewing Company, Defendants.

Assignment of Errors.

Now comes Joseph Schlitz Brewing Company, the plaintiff above named, by J. V. Meek, Theodore Kronshage, Jr., and J. W. McMillan, its solicitors and counsel, and says that the judgment, order and decree entered herein on the 11th day of April, 1916, and each and every part thereof is erroneous and contrary to the rights of said Joseph Schlitz Brewing Company, and now here makes and files its Assignment of Errors upon which it will rely upon the prosecution of its appeal for reversal of said judgment and decree.

1. The District Court erred in dismissing the bill of the said Joseph Schlitz Brewing Company for relief against the defendants above named, Houston Ice & Brewing Company, H. Hamilton, R. L. Autrey, James H. Studdert, Jesse Andrews, Joseph F. Meyer, B. A. Riesner and D. Rossi, as trustee- of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, and otherwise, as successors and assigns of the said Houston Ice &

216 Brewing Company, and each and every of them, and in refusing to grant relief prayed for in the complaint of the complainant herein, and each and every part thereof.

Because, and for the reason, that it was alleged by the complainant, Joseph Schlitz Brewing Company, and proved on the hearing of this cause, that the Joseph Schlitz Brewing Company had prior to the year of 1895, adopted and begun to use upon and in connection with the manufacturing, marketing and sale of its high grade beer in dark amber or brown glass bottles, and as its trade mark and badge for identification of its said beer, the certain exclusive, fancy, peculiar, characteristic, distinctive symbol, device and label, to-wit, A light brown body colored label, with white marginal line around said label near the outer edge thereof, with characteristic white script lettering thereon commencing with the letter "S" beginning with a characteristic flourish and ending in a deep shading near a circular blue figure

on the left side of said label, said white script lettering slanting upward from left to right, with a characteristic and distinctive white paraph underneath said characteristic white script lettering, with white block lettering underneath said characteristic script lettering and paraph, and with a pictorial representation of a globe on the left hand side of such label at and about the center thereof, colored in blue; that the said label, a copy of which is annexed to the complainant, was original with the complainant and has been used exclusively by the complainant for designating beer manufactured by it and put up in bottles, since 1894; that except for the wrongful acts of the defendants, the said use of said original and exclusive mark by the complainant had been continuous and uninterrupted by applying same to beer in brown bottles of complainant's manufacture sold in interstate commerce between the several states of the United States and with Mexico and other foreign countries; that the exclusive and characteristic features, the peculiar appearance, dress and
217 combination of elements used by the complainant had become well established by advertising as well as such exclusive use thereof by the complainant, in such commerce as aforesaid, the complainant having developed an immense plant which manufactured during six years prior to 1912 three hundred and fifty million bottles of beer bearing said distinctive label, between eighty and ninety per cent of which bore the original and distinctive light brown body colored label in the arrangement of letter press and insignia thereon as shown by Exhibit "B" filed with the complaint, fifty millions of which were sold in the State of Texas, and about twelve millions thereof so dressed were so sold in the States of Louisiana and Texas between 1900 and 1912 on orders sent to complainant by the defendants. That in addition to the extensive distribution of beer in bottles with the exclusive and distinctive dress adopted and used by complainant, said complainant had expended large sums in newspaper advertising, in plaques and signs, many of which bore pictures in colors of bottle with label, or the label in colors, and by the wide and extensive use of stationery by complainant and its agents, upon which stationery appeared a miniature fac-simile in colors of said trade mark label; that the users and consumers of beer in bottles, and the public generally accepted the said dark amber or brown glass package with the label thereon in the color and with the color and arrangement of letter press features and elements as aforesaid, as indicating and announcing complainant's beer in bottles; so that the complainant had acquired a valuable good-will by the adoption and use and the acceptance by the public of the said original, distinctive trade mark label and the arrangement, color scheme and combination of elements going to make up the complainant's said distinctive dress of package; that the defendant well knew of the adoption and exclusive use by the complainant of said characteristic and distinctive trade mark and label, and the peculiar and distinctive combination, arrangement and color of devices and symbols thereon, and notwithstanding they had assisted in the sale of said product of the
218 complainant put up in said dark amber, or brown glass bottles, with said exclusive light brown body colored label, with the white marginal line, said white lettering and blue circular figure

thereon, and the exclusive combination and elements, arrangement style of letter press, insignia and coloring, as aforesaid, in the States of Louisiana and Texas, as the agents of said complainant, and had previously sold and caused to be placed upon the said market their own product in light or clear glass bottles with label of white background, black lettering, and with a red encircled figure thereon, the said defendants without the knowledge, acquiescence or consent of complainant, in or about the summer of 1913, being at that time no longer the agents for said complainant, for the first time manufactured and sold, and caused to be manufactured and placed on the market in the States of Louisiana and Texas, where they had previously sold complainant's beer in bottles dressed as aforesaid, as well as in the States of Oklahoma and Florida and in the country of Mexico, beer in dark amber, or brown glass bottles, with a light brown body colored label thereon, upon which was imprinted white script lettering in similitude to the white script lettering employed by the complainant, slanting upward from left to right in the same manner as the lettering upon the complainant's said label slants, and with a distinctive paraph in white underneath said white script lettering, in similitude to the lettering combination and arrangement of elements on complainant's said label, and with a circular figure of predominant blue color at the left hand side of said label, in substantially the same position and with substantially the same style of printing arrangement, combination of elements and coloring of the complainant's said label, used upon and in connection with the distribution of beer in dark amber or brown glass bottles manufactured by the defendants and not the beer of the complainant; that the users and consumers of beer in bottles and the public generally, and particularly persons in various places in the State of Texas, and in the country of Mexico, some of whom were unable to read the English
219 Language, and depended largely upon the peculiar, characteristic and distinctive combination of features and the color, and characteristic style of lettering and arrangement of elements upon complainant's said label, including retailers of beer, were by the acts of the defendants, aforesaid, misled and deceived into the belief that beer not made by the complainant but made and offered for sale by the defendants was the product of complainant, and retailers of beer in bottles were inadvertently misled by said similarity, and unscrupulous retailers passed and palmed off beer in bottles manufactured by the defendants and not by the complainants, and put up and placed upon the market and sold by the defendants in brown bottles, with said labels in the combination of elements, style of lettering and arrangement and coloring of devices thereon, in similitude to and in imitation of the complainant's said original, peculiar and exclusive label and dress of package, so that such beer was offered for sale and sold as and for, and in the belief that said product manufactured by the defendant and put up with the said label in similitude to complainant's label and dress of package, was the product of the complainant, when as a matter of fact, it was the defendant's product so dressed and labelled, and because the wrongful acts of the defendant aforesaid are preventable in Equity, the prayer of the com-

plainant in the bill of complaint herein and amendment thereof should, by reason of the facts aforesaid, have been granted.

II. Said District Court erred in denying the prayer of the said Joseph Schlitz Brewing Company that the defendants above-named be temporarily enjoined and restrained from using upon or in connection with the manufacture, advertisement, announcement, offering for sale and sale of beer in bottles, the fancy, characteristic label and symbols and devices complained of in complainant's bill of complaint, and disclosed upon complainant's exhibits "B" and "C" filed with said bill of complaint in connection with the manu-
220 facture, brewing advertisement, offering for sale or sale of beer in bottles in such way or manner as to be calculated to induce the belief that beer not made or manufactured by the plaintiff was or is in the product of the said plaintiff, and in refusing to grant the relief prayed for in that behalf in said bill of complaint and each and every part thereof.

Because and for the reason that it was alleged in said verified bill of complaint, and supported by numerous affidavits, that the complainant had adopted the fancy unusual trade mark label, not theretofore used by any other manufacturer or distributor of beer in bottles with its peculiar and distinctive style of letter press, peculiar appearance, arrangement of such letter press and features and peculiar and distinctive combination of elements; that it had used said peculiar and distinctive trade mark label, with said exclusive style of letter press and combination of features continuously and uninterruptedly since 1894, and had established a valuable good-will in and to its said characteristic and distinctive trade mark label, registered in the United States Patent Office February 16th, 1895, as trade mark No. 26,385, and re-registered under the Act of Congress February 20th, 1905, Ch. 592, 33 Stats. L. 724, May 1st, 1905, as Trade Mark No. 52,011; that such continuous use from on or about the 15th day of May, 1894, had been and is of said trade mark label in the arrangement of elements in the colors and combination disclosed in and about, and in connection with the advertising, sale, offering for sale and selling of its beer in dark amber, or brown glass bottles; that it was and is perfectly apparent from an inspection of the devices of the defendant's complained of in the bill of complaint of the complainant herein, refer to complainant's exhibits filed with the bill of complaint, that the defendant long after the complainant had adopted and registered and used its characteristic and distinctive label and the style of lettering, arrangement and combination of elements as a badge of identification of its said product, with the knowledge and acquiescence of the said defendants for nineteen years, and in or about the summer or fall of 1913, that the said defendants
221 adopted and used a colorable imitation of said label of the complainant, a label made in similitude to the complainant's said label with similar style of lettering, with a similar combination and arrangement of devices and elements theretofore exclusively used and enjoyed by the complainant, which tended to and did induce persons to purchase beer in bottles so dressed and labeled, not manufactured by the complainant but manufactured by the defend-

ants as and for the beer of the complainant, thereby infringed the exclusive rights of the said complainant, deprived it of the exclusive rights so established by the registration of its said trade mark label, and the long-continued use of the exclusive letter press, arrangement of elements and devices so established and used by the complainant in commerce between the several states of the United States, including the states of Louisiana and Texas, and with foreign countries, including the country of Mexico, and the good-will created by such use by the complainant of said trade mark label upon and in connection with the manufacture, sale and marketing of beer in dark amber or brown glass bottles with its original, peculiar and distinctive combination of elements, arrangement, style of letter press and insignia, and the coloring as hereinbefore alleged, were by such acts of the defendant impaired to the great damage of the complainant in the enjoyment of its exclusive rights established as aforesaid, and retailers of beer in bottles were confused by the use of such colorable imitation of complainant's trade mark label by the defendant, and inadvertently and otherwise offered and sold upon the market beer of the defendant's manufacture so labeled and dressed as and for beer of the complainant, and the consumers of beer were misled into the belief that beer not made by the complainant but manufactured by the defendant and so labelled in similitude to the complainant's dress of package was the beer of the complainant, when in truth and in fact it was the beer of the defendant; and agents of the defendant commented upon the similarity of

222 the defendant's said light brown label attached to and upon dark amber or brown glass bottles, to the complainant's said trade mark label and dress of package, and suggested that beer of the defendant so labelled might be sold and substituted as and for beer of the complainant; and said defendant, by the use of said imitative label to and upon and in connection with the sale of its beer in dark amber or brown glass bottles put it within the power of unscrupulous retail dealers to pass and palm off beer manufactured by the defendant, and so labelled in similitude to the complainant's said trade mark label and dress of package, and by reason of such colorable imitation of the complainant's said trade mark label, and the use thereof by the defendant in commerce between the several states as aforesaid or any of them, and with foreign countries, the complainant as owner of said original trade mark label, and the characteristic and distinctive color and arrangement of elements, is entitled to relief from a court of equity, as prayed for in the Bill of Complaint heretofore filed herein.

III. Said District Court erred in denying the prayer of the complainant, Joseph Schlitz Brewing Company, for a perpetual injunction enjoining and restraining the defendants, Houston Ice & Brewing Company, A. Hamilton, R. L. Autrey, James H. Studdert, Jesse Andrews, Joseph F. Meyer, B. A. Riesner and B. Rossi, as trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, and otherwise, as successors and assigns of the said Houston Ice & Brewing Company, from passing off or furnishing or attempting to pass off, supply or furnish any

beer not made by the plaintiff as the beer of the plaintiff and in refusing to grant such relief and each and every part thereof.

Because and for the reason that it was alleged by the complainant, and proved on the trial of this cause, that beer not manufactured by the complainant but manufactured, distributed and sold by the defendants, contained in dark amber or brown glass bottles bearing a light brown body colored label thereon, with a white mar-
223 ginal line surrounding said label, near the outer edge thereof, with white script lettering thereon slanting upward from left to right, with a characteristic and distinctive white paraph underneath, and with white block lettering underneath said characteristic white script lettering and paraph, and with a circular figure, being of predominant blue coloring thereon, upon the left hand side of such label at and about the center thereof, all and singular the said label and the symbols, devices, and the arrangement and coloring thereon, as well as the characteristic dress of package, being in similitude to and in imitation of the complainant's characteristic and distinctive label, symbols, devices, letter press and dress of package, to-wit, beer in dark amber, or brown glass bottles, bearing a light brown body colored label, with a white marginal line surrounding said label near the outer edges thereof, with characteristic and distinctive white script lettering across said label slanting upward from left to right, with the characteristic white paraph underneath said white script lettering and with white block lettering underneath said characteristic white script lettering and white paraph, and with a circular figure of a globe at the left hand side of said label, at or about the center thereof, all of which said combination, arrangement, coloring and dress of package had been exclusively used by the complainant in the manufacture, marketing, sale and selling of beer in bottles in the States of Texas, Louisiana, and in the country of Mexico, and in other states of the United States, and in foreign countries prior to the acts of defendants above complained of, for upward of more than fifteen years, and because, as the result of such marketing, sale, offering for sale, and selling of such product by the defendants, not the product of the complainant, in the bottles with the label thereon in similitude to and imitation of complainant's said label and dress of package, as described above, the public generally were deceived, and beer manufactured by the complainant was passed and palmed off and substituted for, and others were enabled to pass, palm off, and substitute said beer manufactured and sold by said defendants as and
224 for the beer brewed and bottled by the complainant to the great injury and irreparable loss and damage of the complainant.

IV. Said District Court erred in refusing the plaintiff relief by an accounting of an from the defendant of the gains and profits wrongfully attained and coming to the defendants, Houston Ice & Brewing Company, H. Hamilton, R. L. Autrey, James H. Studdert, Jesse Andrews, Joseph F. Meyer, B. A. Riesner and D. Rossi, as trustees of the Houston Ice & Brewing Company, under a declaration of trust dated October 20th, 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company, by reason of their un-

lawful conduct charged by the complainant, and alleged and proved by evidence adduced on the trial of this cause, and in refusing to grant the same and each and every part thereof.

Because, and for the reason, it was alleged in the complaint of plaintiff, and proved by evidence adduced on the trial that by reason of the manufacture of a superior product by the complainant, and the expenditure of large sums of money in improving the process of manufacturing and advertising its said beer in brown bottles with the characteristic light brown labels, and the devices, symbols and insignia thereon, as hereinabove set out, the public had come to recognize the said characteristic color, letter press and devices heretofore described, used and employed by the complainant to indicate and identify its beer and as a means of asking for, purchasing and of identifying the product of the complainant as sold upon the market; that the defendants well knowing the popularity of the complainant's superior product, and that it had expended large sums of money in advertising its said beer, labelled and marked as heretofore described, throughout the United States of America and in foreign countries, and that to a great extent the said characteristic marks, badges, insignias and colorings, and dress of package had come to indicate, identify and distinguish the beer of the complainant as beer manufactured and sold by the complainant; and that the public
225 generally had for a long time and then were and now are using and employing said characteristic mark, label, insignia, dress of package, and the peculiar color and devices thereon, as hereinbefore set forth, to indicate and identify the said product of the complainant from other makes of beer sold upon the market in the States of Louisiana, Texas, and in the country of Mexico, changed from a light or clear glass bottle with white label thereon as herein alleged and put up its said beer offered in said market, as aforesaid, after on or about the Fall of 1912, in the dark amber, or brown glass bottles, with the characteristic light brown body colored label, and script lettering and devices hereinbefore described thereon, all and singular such package, label, arrangement and combination of elements, being in similitude to and in imitation of the said package, label, arrangement and combination of elements theretofore used and employed by the complainant, exclusive of the rights of any other manufacture of beer in bottles, the use of which said exclusive and peculiar dress of package and insignia thereon, had become generally recognized and acquiesed in by the public to the great profit of the complainant, and the use thereof by the defendants without the permission, license or authority from complainant, and contrary to complainant's wishes in the manufacture, bottling and exposure for sale, and delivery to its customers and retail dealers of beer not manufactured, bottled or put up by complainant, in bottles of similar shape, form and color, combination and arrangement of devices thereon as that of complainant, in simulation and imitation of the complainant's characteristic symbols, devices and label, as hereinbefore set forth, caused the sales of defendant of beer upon the said market to vastly increase to the injury, loss and damage of the said complainant.

V. Said District Court erred in refusing to entertain the prayer of the plaintiff, Joseph Schlitz Brewing Company, for the assessment of damages arising and accruing to the said plaintiff from and for, and by reason of the wrongful conduct of the defendants,
226 disclosed and proved by evidence adduced by the complainant on the trial of this cause, and in refusing to grant the same and each and every part thereof, because, and for the reason assigned in the assignments of error last above written.

VI. Said District Court erred in denying and refusing to receive and admit evidence offered by the complainant, to-wit:

(*a*) Of and in connection with the substitution, passing and palming off of beer put up by the Schober Ice & Brewing Company of San Antonio, Texas, in dark amber, or brown glass bottle, and bearing a brown body-colored label, with white lettering and a blue figure thereon (a pint bottle of which was offered as Complainant's Exhibit No. 4), and in refusing to admit testimony by complainant's witnesses, Williamson and others, that beer in bottles so dressed in similitude of complainant's brown, white and blue color combination, might be passed and palmed off upon the beer drinking public as and for the product of the complainant, and each and every part thereof.

(*b*) Evidence offered by the plaintiff by persons experienced in the handling of beer in bottles as to the possibility of deception or confusion arising from use of defendant's brown package with brown label.

VII. Said District Court erred in admitting evidence offered by defendant to-wit:

(*a*) Defendant's Exhibits X and Y, because, the same were incompetent, irrelevant and immaterial to the issues in this cause, and because, the use of the labels, or bottles, offered had not been identified or shown by the defendants, because, it was admitted by the defendants that they did not know specifically of the use of the said labels or whether, if used, they were so used on
227 brown, or clear glass bottles, and because, the testimony that said labels had been received in answer to a circular letter sent out by defendants that any evidence in that behalf was hearsay and inadmissible.

(*b*) Evidence offered by the defendants of a negative character as to passing and palming off of Southern Select Beer for Schlitz Beer in brown bottles with brown labels.

VIII. Said District Court erred in failing to find from the evidence adduced upon the trial of this cause that the complainant had an exclusive proprietory right to its peculiar and distinctive trade mark label, adopted in the year 1894, and registered in the office of Commission of Patents, April 9th, 1895, pursuant to statute in such cases made and provided, registered under the Ten Year Clause in Act of February 20th, 1905, on May 1st, 1906, as trade mark No. 52,011, and the distinctive and characteristic features thereof, used and exclusively enjoyed by the complainant in commerce between the several states of the United States, and in foreign

countries for upwards of twenty years prior to the hearing of this cause, except for the acts of the defendants, because and for the reason, that it was proved upon the hearing of this cause that the complainant had adopted said trade mark label prior to registration in the year 1894, and the distinctive and characteristic features thereof, because, of the unusual and exclusive features not having theretofore been used upon beer in bottles by any other manufacturer or distributer of similar products, and had used said characteristic and distinctive trade mark label and the exclusive features thereof continuously to the present time upon and in connection with the manufacture, offering for sale and sale of beer put up in dark amber or brown glass bottles, with the distinctive, characteristic and exclusive coloring of the devices thereon, to-wit: Said label printed in light brown body color, with a white marginal line around it near the outer edge thereof, the characteristic script letter-
228 ing across the said label on an angle upwards from left to right, in white, and a white paraph underneath said white script lettering, and white block lettering underneath said script lettering and paraph, and the figure of a blue globe, circular in shape, at the left hand side of said label; all of which adoption and use was known by and to the defendants; that between the years 1900 and 1912, the defendants had acquiesced in the use by the complainant of said trade mark label and the exclusive and distinctive features thereof, and its use in the coloring and arrangement of said features, by assisting said complainant in the distribution of upwards of eight hundred car loads and half car loads in the States of Louisiana and Texas; that the complainant had jealously guarded its exclusive proprietory right in and to said label, and the peculiar and distinctive features thereof, and its use upon and in connection with the sale of beer in amber, or brown glass bottles, with the characteristic coloring of the features, as aforesaid, and so far as complainant knew they were at the time of the acts of defendants, complained of in its bill of complaint herein, in the exclusive enjoyment of such proprietory rights in and to said trade mark label and the use thereof, and of the characteristic arrangement and coloring thereof; that the complainant had expended upward of Two Million One Hundred Thousand Dollars in advertising its said product, and otherwise kept the distinctive and characteristic features and the coloring and arrangement of its said label before the public in addition to the use thereof during the six years ending in 1912, by the distribution of three hundred and fifty milllon bottles thereof bearing such characteristic and distinctive label in the coloring aforesaid, to the public in the various states of the United States, fifty million of said bottles bearing such characteristic labels, in colors aforesaid, having been distributed in the State of Texas, and upwards of twelve million of said bottles having been distributed in the States of Louisiana and Texas, by the defendants by distribution to dealers in said product of plaques and signs in coloring showing
229 the said distinctive label and also the bottles, in color aforesaid, with said distinctive label thereon; by exclusive distri-

bution of envelopes and letter heads to its agents and distributors, perhaps, seventy-five to one hundred of whom were located in the State of Texas, and received and distributed such stationery bearing a fac-simile in miniature of said label in color; that by reason of such use of said label and the distinctive features thereof in connection with the manufacture and sale, and the distribution of its superior product, complainant had obtained a valuable good will in connection with the adoption and use of said trade mark label and the distinctive features thereof, in the coloring as aforesaid, upon and in connection with the sale of beer in dark amber, or brown glass bottles, which said District Court in equity and good conscience ought to have protected.

IX. Said District Court erred in refusing to find that the allegations of said bill of complaint as to the unlawful acts of the defendant were sustained by the evidence, and in not granting the relief therein prayed for, by reason of such infringement of its rights and each and every part thereof, because, and for the reason that in addition to the facts hereinbefore set out, it was alleged and proved on the hearing of this cause that long after the complainant had adopted and was enioying the use of its said trade mark label and characteristic and distinctive features thereof upon and in connection with said sale of beer in dark amber, or brown glass bottles, with the characteristic and distinctive coloring of the several devices, and the peculiar and distinctive arrangements thereof, the defendants, without the knowledge, acquiescence or consent of the complainant, and against its protest changed the coloring of their bottles in which its Southern Select beer was put up, from a light or clear glass bottle with a white label thereon, with a black solid line script lettering thereon, and the circular trade mark figure with a predominant red circle, to dark amber, or brown glass bottle similar to those
230 used by the complainant, and at the same time adopted and used upon and in connection with said beer so put up in dark amber, or brown glass bottles a light brown body colored label, with white marginal line surrounding it, with white script lettering commencing with the characteristic "S," all in similitude to the complainant's "S" and white script lettering upon its said trade mark label theretofore exclusively used by it, with a distinctive white paraph underneath said white script lettering upon said light brown body colored label, in similitude to complainant's paraph underneath the white script lettering upon its label, all with a slant upwards from left to right, with white block lettering underneath said white script lettering and white paraph upon said light brown body colored label, and with a distinctive figure with a predominant blue circle surrounding it in similitude to the blue figure of a globe on complainant's said label, all upon a light brown body colored label upon and in connection with the manufacture, sale and distributing of beer in dark amber, or brown glass bottles; that the public who had come to recognize the peculiar and distinctive trade mark label and distinctive features and coloring thereof of the complainant as a badge of origin and of distinguishing and identifying complain-

ant's product, and persons in various parts of Texas and Mexico were deceived by the use of the defendant upon and in connection with beer in bottles not manufactured by the complainant but manufactured by said defendants, into the belief that said product of the defendant so put up and marked in similitude to the complainant's product and its dress of package, and were induced to buy and did buy such beer not manufactured by complainant but manufactured and offered for sale and sold by defendants as and for the beer of the complainant, and dealers and retailers of said product could and did pass and palm off upon the public beer in dark amber, or brown glass bottles manufactured by and bearing such label of the defendant in similitude to complainant's label as and for the beer of complainant to its injury and damage, for which all and singular
231 the acts of defendants, aforesaid, the complainant was in equity and good conscience entitled to the relief and each and every part thereof demanded in its said bill of complaint and amendments thereto.

X. Because said order and decree made and entered April 11th, 1916, dismissing the bill of complaint of the complainant herein is contrary to the evidence adduced upon the hearing of said cause as hereinbefore particularly set out in connection with the other errors assigned and not again here repeated for brevity.

XI. Said District Court erred in dismissing said bill of complaint because, and for the reason that the said order was contrary to provision of Section 16 of the Acts of Congress, February 20th, 1905, and further for the reasons hereinbefore set out.

XII. Because said order dismissing said bill of complaint and each and every part thereof, is contrary to the law in such cases made and provided, for the reason that the use by the defendants of such labels in similitude to complainant's label upon and in connection with the sale of beer in bottles put up in dark amber or brown glass bottles in the manner hereinbefore set out, created unfair competition injurious to the established rights of complainant, for which it was and now still is entitled to the relief demanded, and each and every part thereof, in said bill of complaint and amendments thereto.

XIII. Because said order made and entered on the 11th day of April, 1916, dismissing said bill of complaint of the complainant and each and every part thereof is contrary to equity and good conscience for the reasons hereinabove specifically set out, and not here repeated for brevity.

XIV. Because said District Court, if authorized to exercise any discretion in granting or refusing the relief prayed for by
232 complainant herein, did not exercise such discretion judicially in dismissing said bill of complaint, but did so contrary to and in disregard to the rights of said complainant, Joseph Schlitz Brewing Company, as asserted in said bill of complaint and the amendments thereto, for relief, all and singular for the reasons hereinabove stated, and not here again repeated for brevity.

Wherefore the said Joseph Schlitz Brewing Company prays that

said order and decree made and entered on the 11th day of April, 1916, and each and every part thereof be reversed.

JOSEPH SCHLITZ BREWING COMPANY,
By J. V. MEEK,
Att'y of Record.

THEO. KRONSHAGE and
J. W. McMILLAN,
Of Counsel.

Petition for Allowance of Appeal.

Filed August 2, 1916.

In the District Court of the United States for the Southern District of Texas.

In Equity. No. 44.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE AND BREWING COMPANY, H. HAMILTON, R. L. Autrey, James H. Studdert, Jesse Andrews, Joseph F. Meyer, B. A. Riesner and D. Rossi, as Trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company, Defendants.

The above named plaintiff, Joseph Schlitz Brewing Company, conceiving itself aggrieved by the judgment, order and decree entered on April 11th, 1916, in the above entitled cause doth hereby appeal from said order, judgment and final decree to the Circuit Court of Appeals of the Fifth Judicial Circuit of the United
233 States, and it prays that this its appeal may be allowed, and that the amount of bond to be given by it upon such appeal may be fixed by the order of this court, and that a transcript of the record and proceedings and papers upon which said order, judgment and final decree was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Fifth Circuit of the United States sitting at New Orleans, Louisiana.

The said Joseph Schlitz Brewing Company presents herewith its assignments of errors upon such appeal, and offers to file same, and asks that a citation may issue herein pursuant to law, under the hand of the presiding Judge of this Court.

Dated Houston, Texas, August 3rd, 1916.

J. V. MEEK,
THEODORE KRONSHAGE, JR.,
J. W. McMILLAN,
Attorneys for Plaintiff & Appellant,
Joseph Schlitz Brewing Company.

Received copy of foregoing this 31st July, 1916.

WALTER H. WALNE,
Solicitor for Def'ts.

234 *Order Allowing Appeal and Fixing Bond.*

Filed August 4, 1916.

In the District Court of the United States for the Southern District of Texas.

In Equity. No. 44.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE AND BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDERT, JESSE ANDREWS, JOSEPH F. MEYER, B. A. Riesner and D. Rossi, as Trustees of the Houston Ice & Brewing Association, Under a Declaration of Trust Dated October 20th, 1914, and Otherwise as Successors and Assigns of the Said Houston Ice & Brewing Company, Defendants.

And now, to-wit, on August 3rd, 1916, on motion of J. V. Meek, Theodore Kronshage, Jr., and J. W. McMillan, solicitors and of counsel for the plaintiff herein, it is ordered that the appeal of the said Joseph Schlitz Brewing Company be allowed as prayed for upon the filing of a bond in the penal sum of Two Thousand Dollars ($2000) with good and sufficient surety to be approved by the court, conditioned that said Joseph Schlitz Brewing Company shall prosecute the said appeal to effect and answer all damages and costs if said Joseph Schlitz Brewing Company fail to make said appeal good.

W. T. BURNS,
District Judge.

235 *Bond on Appeal.*

Filed August 9th, 1916.

In the District Court of the United States for the Southern District of Texas.

In Equity. No. 44.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE AND BREWING COMPANY, H. HAMILTON, R. L. AUTREY, James H. Studdert, Jesse Andrews, Joseph F. Meyer, B. A. Riesner, and D. Rossi, as trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company, Defendants.

Know all men by these presents that we, Joseph Schlitz Brewing Company, a Corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin as principal, and American Surety Company of New York a Corporation duly organized and existing under and by virtue of the laws of the State of Texas and duly authorized to transact business in the State of Texas, as Surety, are held and firmly bound unto Houston Ice & Brewing Company, H. Hamilton, R. L. Autrey, James H. Studdert, Jesse Andrews, Joseph F. Meyer, B. A. Riesner and D. Rossi, as Trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company, in the penal sum of Two Thousand ($2,000) Dollars, lawful money of the United States of America, to be paid to said obligee jointly and severally and to their respective heirs, executors, administrators or assigns, for which payment well and truly to be made we hereby bind ourselves, our heirs, executors, administrators and assigns respectively,
236 jointly and severally by these presents.

Witness our hands and seals this 4th day of August, A. D. 1916.

Whereas, on the 11th day of April, A. D. 1916, in the District Court of the United States in and for the Southern District of Texas, a certain order and decree was entered dismissing the bill of complaint in the above entitled action, all in manner and form as in said order and decree stated, and

Whereas, said Joseph Schlitz Brewing Company having this day applied for and obtained an appeal to reverse said decree to the United States Circuit Court of Appeals in and for the Fifth Circuit and a citation having duly issued directed to said Houston Ice & Brewing Company, H. Hamilton, R. L. Autrey, James H. Studdert,

Jesse Andrews, Joseph F. Meyer, B. A. Riesner and D. Rossi, as Trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company, admonishing them and each of them to be and appear at a session of the United States Circuit Court of Appeals in and for the Fifth Circuit to be holden in New Orleans in the State of Louisiana, and

Whereas, in the order allowing said appeal it is provided that said Joseph Schlitz Brewing Company file an appeal bond herein in the sum of Two Thousand Dollars ($2,000) with surety conditioned according to law;

Now, therefore, the conditions of the above obligation are such that if the said Joseph Schlitz Brewing Company shall prosecute the said appeal to effect and answer all damages and costs, if it fails to make said appeal good, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof, the said principal has caused this bond to be executed by its duly authorized officers and the said surety
237 has duly caused this bond to be executed by its duly authorized agent and attorney in fact this 4th day of August A. D. 1916.

JOSEPH SCHLITZ BREWING COMPANY,
[SEAL.] By ALFRED UIHLEIN,
Its President.

Attest:
ROBERT S. UIHLEIN, *Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By K. S. DARGAN,
Its Resident Assistant Secretary.

Attest:
JAS. L. STOREY,
Its Resident Vice-President.

Approved this 7th day of August, A. D. 1916.
W. T. BURNS,
District Judge.

Petition to Have Physical Exhibits, Etc., Transmitted With Record.

Filed August 4th, 1916.

In the District Court of the Uuited States for the Southern District of Texas.

In Equity. No. 44.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE AND BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDERT, JESSE ANDREWS, JOSEPH F. MEYER, B. A. Riesner and D. Rossi, as trustee of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company, Defendants.

Comes now the Complainant by J. V. Meek and J. W.
238 McMillan, its solicitors and counsel, and shows to the court that certain original exhibits attached to and admitted in evidence in connection with the original deposition of E. A. Bielfeld and A. C. Bauman are of labels and documents not now obtainable by either party to this cause and copies thereof cannot be transmitted with the said record for incorporation in the printed record.

That among said exhibits so attached to the original depositions of E. A. Bielfeld and A. C. Bauman are the following:

Complainant's Exhibit "F", copy of brown label of "American" Brewing Company, New Orleans.

Complainant's Exhibit "G", copy of brown label, Petersen's standard beer.

Complainant's Exhibit "H", copy of brown label, Empire Beer, A. Kuhfeld, Proprietor.

Complainant's Exhibit "I", copy of brown label, white lettering and blue figure.

Complainant's Exhibit "J", copy of brown label "Scales" beer, with blue figure of horse shoe.

Complainant's Exhibit "K", copy of brown label Eckers "Bohemian" lager.

Complainant's Exhibit "L", copy of brown label "Schuttz" beer, with blue football on said label.

Complainant's Exhibit "M", copy of brown label "Special Brew," blue picture of Chief Pocatello thereon.

Complainant's Exhibit "*N &O*". Two photographs each three bottles of "Blitz", three bottles of Schlitz beer marked A. Scarboro, Beyreuth, Syria,

Complainant's Exhibits "BB, BB1, BB2 and BB3" being proofs of magazine advertisement.

239 Complainant's Exhibits "CC, CC1, CC2, CC3, and CC4" being proofs of newspaper advertisements.

Complainant's Exhibit "DD" being a "Beware of Imitations" circular sent out by the complainant.

That certain exhibits offered by the Complainant and by the Defendants are too bulky to be printed with or attached to said record, to-wit:—

1. Complainant's Exhibit "B", filed with the complaint being a small sized bottle of Schlitz beer in dark amber or brown bottle, with brown labels thereon, also marked on hearing of this cause, "Defendant's Exhibit "W".

2. Complainant's Exhibit "D" filed with complaint, being a specimen bottle of defendant's product put up in brown bottle with brown label, also marked on hearing of the cause as Defendant's Exhibit "R".

3. Complainant's Exhibit "E" filed with complaint, being specimen bottle of Defendant's original Southern Select Beer put up in clear glass bottle with white label thereon, also marked on the hearing of this cause, "Defendant's Exhibit "U".

4. Complainant's Exhibit "42 for identification, being specimen bottle "Schober Beer", in brown bottle with brown label.

5. Complainant's Exhibit "7", being a catalogue of Milwaukee Litho. & Engraving Co., this company having gone out of business in 1902.

6. Complainant's Exhibit "8" being a catalogue of Milwaukee Lithographing Co.

7. Complainant's Exhibit "10", being glass sign picture of Southern Select brown label.

240 8. Complainant's Exhibit "11" being page of Houston Daily Post, March 14th, 1915, showing advertisement, Southern Select beer.

9. Complainant's Exhibit "14", being specimen quart bottle of Southern Select Beer in brown bottle with brown label first used by defendant.

10. Complainant's Exhibit "15" being specimen quart bottle of Southern Select beer with label of brown color, white lettering and the blue figure as first changed by defendant.

11. Complainant's Exhibit "Y", offered in evidence and filed with the depositions of E. A. Bielfeld, being a plaque showing the interior of a smithy, with a man and woman in the foreground, and showing facsimile in color, about the size of a quart bottle, a bottle of Schlitz Beer in brown bottle with brown label.

12. Complainant's Exhibit "Y-2", offered in evidence and filed with the depositions of E. A. Bielfeld, being a glass wall sign with brass back, a picture in colors, or brown label of Jos. Schlitz Brewing Company, used upon and in connection with the sale of its beer in brown bottles.

13. Complainant's Exhibit "Y-3", offered in evidence and filed

with the depositions of E. A. Bielfeld, being a wall sign of glass, having printed thereon the picture of a blue globe, surrounded with red belt, upon which is the word "Schlitz", and the work "trade mark" on the loose end of the belt, and underneath said picture of globe is the picture of Schlitz light brown label in colors.

14. Complainant's Exhibit "Y-4", offered in evidence and with the depositions of E. A. Bielfeld, being the picture of a quart sized bottle of Schlitz Beer in natural coloring, showing prom-
241 inently thereon the light brown body colored label, lettering and insignia, with the picture of a winged woman upon a pedestal in the back ground.

15. Complainant's Exhibit "Y-5", offered in evidence and filed with the depositions of E. A. Bielfeld, being a black glass sign on an easel having printed thereon the picture of Schlitz light brown label.

16. Complainant's Exhibit "Y-6", offered in evidence and filed with the depositions of E. A. Bielfeld, being a glass, blue background easel sign, with the picture of Schlitz light brown label and of its features in colors.

17. Complainant's Exhibit "Y-7", offered in evidence and filed with the depositions of E. A. Bielfeld, being a glass sign picture in colors of a large size bottle of Schlitz beer, showing prominently thereon the light brown body colored label in colors, and underneath the words, "We sell it".

18. Complainant's Exhibit "Y-8" offered in evidence and filed with the deposition of E. A. Bielfeld, being a glass corner sign similar to Complainant's Exhibit Y-7, being a circular glass bearing the said bottle in color, with said label in color prominently imprinted thereon.

19. Defendant's Exhibit "N", being a copy of the Houston Daily Post, Sunday Morning March 28th, 1915.

20. Defendant's Exhibit "O", being a page of labels each having a paraph underneath, offered by the defendant.

21. Complainant's Exhibit "T", being a specimen bottle of Southern Select, with second modification of brown label.

22. Defendant's Exhibit "U", being a specimen bottle of Southern Select beer in brown bottle, with third modification of brown label.

242 23. Defendant's Exhibit "X", being a brown bottle having pasted thereon a brown label bearing the words "Roby Beer, Tampa, Fla.

24. Defendant's Exhibit "Y", being a brown bottle having pasted thereon a label, "Briggs Beer, Elmira, N. Y."

25. Defendant's Exhibit "Z", being a carton for holding four bottles of Southern Select Beer with printed matter thereon.

Wherefore, Complainant respectfully prays the court that said Exhibits be transmitted to and filed with the Circuit Court of Appeals as a part of this record, without being printed; that the Clerk transmit to the Circuit Court of Appeals the original depositions of E. A. Bielfeld having attached thereto the respective labels and ex-

hibits here expressly enumerated, referred to in his said testimony, and which complainant is unable to duplicate.

JOSEPH SCHLITZ BREWING COMPANY.
J. W. MEEK,
THEODORE KRONSHAGE, Jr.,
J. W. McMILLAN,
Its Solicitors and Counsel.

Received copy of this Motion on July 31, 1916.

WALTER H. WALNE,
Solicitor for Defts.

243 *Order Authorizing Transmitting of Physical Exhibits, Etc.*

Filed August 4th, 1916.

In the District Court of the United States for the Southern District of Texas.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDERT, JESSE ANDREWS, JOSEPH F. MEYER, B. A. Riesner and D. Rossi, as Trustees of the Houston Ice & Brewing Association, Under a Declaration of Trust Dated October 20th, 1914, and Otherwise as Successors and Assigns of the Said Houston Ice & Brewing Company, Defendants.

On the record, files and proceedings herein, and upon the application and petition of J. V. Meek, Theodore Kronshage, Jr., and J. W. McMillan, Solicitors and of counsel for Complainant.

It is ordered that the Exhibits offered in evidence on the trial of the above-entitled cause which were too bulky to be printed or attached to the record as hereinafter set forth, be transmitted to and filed with the Clerk of the Circuit Court of Appeals.

It is further ordered that the original depositions of E. A. Bielfeld and A. C. Bauman be so transmitted to the Clerk of the Circuit Court of Appeals in lieu of having printed, the original exhibits therein contained, copies of which are not now available.

The following is a list of physical exhibits to be transmitted pursuant to this order.

1. Complainant's Exhibit "B" filed with the complaint being a small sized bottle of Schlitz Beer in dark amber, or brown bottle, with brown label thereon, also marked on hearing of this cause, "Defendants Exhibit 'W.'"

244 2. Complainant's Exhibit "D" filed with complaint, being a specimen bottle of defendant's product put up in brown

bottle with brown label, also marked on hearing of the cause as "Defendant's Exhibit "R."

3. Complainant's Exhibit "E" filed with complaint, being specimen bottle of Defendant's original Southern Select Beer put up in clear glass bottle with white label thereon, also marked on hearing of this cause, "Defendant's Exhibit "U."

4. Complainant's Exhibit "4" for identification, being specimen bottle "Schober Beer," in brown bottle with brown label.

5. Complainant's Exhibit "7," being a catalogue of Milwaukee Litho. & Engraving Co. This company having gone out of business in 1902.

6. Complainant's Exhibit "8" being a catalogue of Milwaukee Lithographing Co.

7. Complainant's Exhibit "10" being glass sign picture of Southern Select Brown Label.

8. Complainant's Exhibit "11" being page of Houston Daily Post, March 14th, 1915, showing advertisement, Southern Select Beer.

9. Complainant's Exhibit "14" being specimen quart bottle of Southern Select Beer in brown bottles with brown label first used by the defendant.

10. Complainant's Exhibit "15" being specimen quart bottle of Southern Select Beer with label of brown color, white lettering and the blue figure as first changed by defendant.

11. Complainant's Exhibit "Y," offered in evidence and filed with the deposition of E. A. Bielfeld, being a plaque showing the
245 interior of a smithy, with a man and woman in the foreground, and showing fac-simile in color, about the size of a quart bottle a bottle of Schlitz Beer in brown bottle with brown label.

12. Complainant's Exhibit "Y-2," offered in evidence and filed with the deposition of E. A. Bielfeld, being a glass wall sign with brass back, a picture in colors, or brown label of Jos. Schlitz Brewing Company, used upon and in connection with the sale of its beer in brown bottles.

13. Complainant's Exhibit "Y-3," offered in evidence and filed with the depositions of E. A. Bielfeld, being a wall sign of glass, having printed thereon the picture of a blue globe, surrounded with red belt, upon which is the word "Schlitz," and the word "Trade mark" on the loose end of the belt, and underneath said picture of globe is the picture of Schlitz light brown label in colors.

14. Complainant's Exhibit "Y-4," offered in evidence and filed with the depositions of E. A. Bielfeld, being the picture of a quart sized bottle of Schlitz Beer in natural coloring, showing prominently thereon the light brown body colored label, lettering and insignia, with the picture of a winged woman upon a pedestal in the background.

15. Complainant's Exhibit "Y-5," offered in evidence and filed with the depositions of E. A. Bielfeld, being a black glass sign on an easel having printed thereon the picture of the Schlitz light brown label.

16. Complainant's Exhibit "Y-6", offered in evidence and filed with the depositions of E. A. Bielfeld, being a glass, blue back ground

easel sign, with the pisture of Schlitz light brown label and of its feature in colors.

246 17. Complainant's Exhibit "Y-7", offered in evidence and filed with the depositions of E. A. Bielfeld, being a glass sign picture in colors of a large size bottle of Schlitz Beer, showing prominently thereon the light brown body colored label in colors, and underneath the words, "We sell it."

18. Complainant's Exhibit "Y-8," offered in evidence and filed with the depositions of E. A. Bielfeld, being a glass corner sign similar to Complainant's Exhibit "Y-7," being a circular glass bearing the said bottle in color, with said label in color prominently imprinted thereon.

19. Defendant's Exhibit "N," being a copy of the Houston Daily Post, Sunday Morning, March 28th, 1915.

20. Defendant's Exhibit "O," being a page of labels, each having a paraph underneath, offered by the defendant.

21. Defendant's Exhibit "T," being a specimen bottle of Southern Select, with second modification of brown label.

22. Defendant's Exhibit "V," being a specimen bottle of Southern Select beer in brown bottle, with third modification of brown label.

23. Defendant's Exhibit "X," being a brown bottle having pasted thereon a brown label bearing the words, "Roby Beer, Tampa, Fla."

24. Defendant's Exhibit "Y," being a brown bottle having pasted thereon a label, "Brigg's Beer, Elmira, N. Y."

25. Defendant's Exhibit "Z," being a carton for holding four bottles of Southern Select beer with printed matter thereon.

Dated Houston, Texas, August 3rd, A. D. 1916.

By the Court.

W. T. BURNS,
District Judge.

247 *Notice of Filing Præcipe.*

Filed Aug. 4, 1916.

In the District Court of the United States for the Southern District of Texas.

In Equity. No. 44.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDERT, JESSE ANDREWS, JOSEPH F. MEYER, B. A. Riessner and D. Rossi, as Trustees of the Houston Ice & Brewing Association, Under a Declaration of Trust Dated October 20th, 1914, and Otherwise as Successors and Assigns of the Houston Ice & Brewing Company, Defendants.

To Baker, Botts, Parker & Garwood; Jesse Andrews and W. H. Walne, Attorneys of record for the defendant above named:—

You are hereby notified that we will file with the Clerk of the United States District Court in and for the Southern District of Texas, in the above entitled cause, a precipe for record upon the appeal of Joseph Schlitz Brewing Company from the orders, judgment and decree entered herein on April 11th, 1916, as per copy hereto attached, which is herewith served upon you.

J. V. MEEK,
THEODORE KRONSHAGE, JR.,
J. W. McMILLAN,
Solicitors and of Counsel for Joseph Schlitz Brewing Co., Plaintiff Herein.

Received copy of above notice and of præcipe for Record therein referred to, this 31st day of July, A. D. 1916.

WALTER H. WALNE,
Solicitor for Def'ts.

248 In the District Court of the United States for the Southern District of Texas.

In Equity. No. 44.

JOSEPH SCHLITZ BREWING CO., Complainant,

vs.

HOUSTON ICE & BREWING COMPANY et als., Defendants.

To the Clerk of the United States District Court for the Southern District of Texas:

You are hereby requested to prepare a transcript of the record upon the appeal of Joseph Schlitz Brewing Company from the final decree entered therein on the 11th day of April, 1916, comprising all the papers, proceedings and files therein, as per the following præcipe:

Præcipe for Record.

1. Bill of Complaint, filed March 14th, 1914.
2. Order setting motion for temporary injunction, filed March 20th, 1914.
3. Defendant's Answer, filed June 10th, 1914.
4. Complainant's reply to above answer, filed June 10th, 1914.
5. Order refusing temporary writ of injunction, filed October 6th, 1914.
6. First Amended Bill of Complaint, filed February 11th, 1915.
7. Order of Court amending Bill of Complaint, filed February 11th, 1915.
8. Answer to Amended Bill, filed March 27th, 1915.
9. Final Decree dismissing Bill, filed April 11th, 1916.
10. Order allowing sixty days from adjournment to perfect appeal, filed April 11, 1916.
11. Order for Adjournment of Court, made and filed April 15th, 1916.
12. Order extending time to perfect Appeal sixty days from June 14th, 1916, filed June 14th, 1916.
13. Notice of Application for Approval of Certificate of Evidence and statement of proceedings.

249 14. Certificate of Evidence and Statement of Proceedings had, in accordance with Rule 75.

15. Complainant's Assignment of Errors.
16. Petition for Appeal.
17. Order allowing Appeal, and fixing bond.
18. Bond on Appeal.
19. Petition to have original depositions and physical exhibits transmitted with record.

20. Order authorizing transmitting of original depositions and physical exhibits.
21. Notice of filing Præcipe for Record.
22. Præcipe for Record.
23. All exhibits and other articles and documents mentioned and recited in the Certificate of Evidence and made a part thereof by reference, and not hereinbefore particularly specified.
24. Citation issued August 3rd, 1916.

J. V. MEEK,
THEODORE KRONSHAGE &
J. W. McMILLAN,
Attorneys for Complainants.

Houston, Texas, August 4th, 1916.

Præcipe for Record.

Filed August 4, 1916.

In the District Court of the United States for the Southern District of Texas.

In Equity. No. 44.

JOSEPH SCHLITZ BREWING CO., Complainant,

vs.

HOUSTON ICE & BREWING COMPANY et als., Defendants.

To the Clerk of the United States District Court for the Southern District of Texas:

You are hereby requested to prepare a transcript of the record upon the appeal of Joseph Schlitz Brewing Company from the Final Decree entered therein on the 11th day of April, 1916,
250 comprising all the papers, proceedings and files therein, as per the following Præcipe:

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8. Answer to Amended Bill, filed March 27th, 1915.
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13. Notice of Application for Approval of Certificate of Evidence and Statement of proceedings.

251 14. Certificate of Evidence and Statement of Proceedings had in accordance with Rule 75.

15. Complainant's Assignment of Errors.
16. Petition for Appeal.
17. Order Allowing Appeal, and fixing Bond.
18. Bond on Appeal.
19. Petition to have Original Depositions and Physical Exhibits Transmitted with Record.
20. Order Authorizing Transmitting of Original Depositions and Physical Exhibits.
21. Notice of Filing Præcipe for Record.
22. Præcipe for Record.
23. All Exhibits and other articles and documents mentioned and recited in the Certificate of Evidence and made a part thereof by reference and not hereinbefore particularly specified.
24. Citation issued August 3rd, 1916.
25. Agreement, Filed August 8, 1916.
26. Agreement of Counsel to Attach Exhibits, Filed Aug. 8, 1916.
27. Agreement of Counsel Waiving time and Notice for Approval of Certificates of Evidence and Exceptions.

J. V. MEEK,
THEODORE KRONSHAGE, JR.,
J. W. McMILLAN.

Houston, Texas, August 14, 1916.

252 Received copy of foregoing this 31st July, 1916.

WALTER H. WALNE,
Solicitor for Def'ts.

Agreement.

Filed August 8th, 1916.

In the District Court of the United States for the Southern District of Texas.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDERT, JESSE ANDREWS, JOSEPH F. MEYER, B. A. Riesner and D. Rossi, as Trustees of the Houston Ice & Brewing Association, Under a Declaration of Trust Dated October 20th, 1914, and Otherwise as Successors and Assigns of the Houston Ice & Brewing Company, Defendants.

It is hereby mutually stipulated and agreed that in this cause when the record for appeal is perfected and printed, in keeping with the rules and practice, that this cause shall be returnable and filed in the Circuit Court of Appeals of this District, sitting and being held in the City of New Orleans on the 1st day of January, 1917, with and by consent and approval of said Court, instead of being made returnable to the City of Fort Worth, in the State of Texas, it being more convenient for said appeal to be heard in the City of New Orleans, than in the City of Fort Worth, and each and all parties hereto agree that said appeal shall be made returnable to said Court sitting at New Orleans, aforesaid, instead of the City of Fort Worth, State of Texas.

253 Witness our hands this the 8th day of August 1916.

THEO. KRONSHAGE,
J. W. McMILLAN AND
J. V. MEEK,
Attorneys for Plaintiffs.
JESSE ANDREWS,
W. H. W.,
WALTER H. WALNE,
Attorneys for Defendants.

Agreement of Counsel to Attach Exhibits.

Filed August 8th, 1916.

In the District Court of the United States for the Southern District of Texas.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

VS.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDERT, JESSE ANDREWS, JOSEPH F. MEYER, B. A. Riesner and D. Rossi, as Trustees of the Houston Ice & Brewing Association, Under a Declaration of Trust Dated October 20, 1914, and Otherwise as Successors and Assigns of the Said Houston Ice & Brewing Company, Defendants.

The Certificate of Evidence and exceptions in this cause being incomplete so far as certified copies that were used in evidence from the Patent Office, it is agreed that said Certificate of Evidence and Exceptions may be approved by the Judge in its present form, and when said certified copies from the Patent Office are received the Clerk of the District Court of the United States for the Southern District of Texas, is now here authorized and directed to attach said copies of trade marks and labels that was offered in evidence,
254 as shown by copies from the Patent Office on the trial of said Cause but which have been misplaced and at present are not accessible.

Witness our hands this the 8th day of August, 1916.

THEO. KRONSHAGE,
J. W. McMILLAN AND
J. V. MEEK,
Attorneys of Record for Plaintiff.
JESSE ANDREWS,
W. H. W.,
WALTER H. WALNE,
Attorneys of Record for Defendants.

Agreement of Counsel Waiving Time and Notice for Approval of Certificate of Evidence and Exceptions.

Filed August 8th, 1916.

In the District Court of the United States for the Southern District of Texas.

JOSEPH SCHLITZ BREWING COMPANY, Plaintiff,

vs.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDERT, JESSE ANDREWS, JOSEPH F. MEYER, B. A. Riesner and D. Rossi, as Trustees of the Houston Ice & Brewing Association, Under a Declaration of Trust Dated October 20, 1914, and Otherwise as Successors and Assigns of the Said Houston Ice & Brewing Company, Defendants.

Now comes the plaintiff in the above styled cause by its attorneys of record, Theo. Kronshage, J. W. McMillan and J. V. Meek, also defendants by their attorneys of record, Baker, Botts, Parker & Garwood, Jesse Andrews and W. H. Walne, and now here
255 present to the Court the Certificate of Evidence and Exceptions in this case, made and prepared under Equity Rules which have been by counsel of plaintiff and defendants duly examined and approved, and now here show to the Court that they waive the fixing of time for the presentation of said certificate to the court for approval, and waive the notice of presenting same, as provided under Rule No. 75, and state and show to the Court that said Certificate of Evidence and Exceptions is correct, counsel for both plaintiff and defendants waiving their personal presence and ask that same may be approved and allowed in their absence, and for all of which they will ever pray.

Witness our signatures this the 8th day of August, A. D. 1916.

THEO. KRONSHAGE,
J. W. McMILLAN,
J. V. MEEK,
Attorneys of Record for Plaintiff, Jos. Schlitz Brewing Company.
JESSE ANDREWS,
By W. K. W.,
WALTER H. WALNE,
Attorneys of Record for Defendants.

256 *Clerk's Certificate.*

In the District Court of the United States for the Southern District of Texas, Houston Division.

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, do hereby certify the foregoing to be a true and correct copy of the record, Assignment of Errors, and all proceedings in the case as called for in the Præcipe for Transcript on page- 270-271 of this Record, in Equity Cause No. 44, entitled Joseph Schlitz Brewing Company vs. Houston Ice & Brewing Company et als., as the same now appears on file and of record in my office.

To certify which, witness my hand and the seal of said Court, at Houston, in said District, this the 22nd day of August, A. D. 1916.

[SEAL.]

L. C. MASTERSON,
Clerk United States District Court,
Southern District of Texas.

257 That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:—

Argument and Submission.

Extracts from the Minutes of February 27th, 1917.

No. 2990.

JOSEPH SCHLITZ BREWING COMPANY

versus

HOUSTON ICE & BREWING COMPANY et als.

On this day this cause was called, and, after argument by Theodore Kronshage, Esq., for appellant, and Jesse Andrews, Esq., for appellees, was submitted to the Court.

Opinion of the Court.

Filed April 28th, 1917.

In the United States Circuit Court of Appeals, Fifth Circuit.

Number 2990.

JOSEPH SCHLITZ BREWING COMPANY, Appellant,

v.

HOUSTON ICE & BREWING COMPANY et als., Appellees.

Appeal from the District Court of the United States for the Southern District of Texas.

Theodore Kronshage, Jr., Russell Jackson and J. W. McMillan, for appellant.
Baker, Botts, Parker & Garwood, for appellees.

258 Before Pardee and Walker, Circuit Judges, and Grubb, District Judge.

GRUBB, *District Judge,* delivered the opinion of the Court.

This is an appeal from a decree of the District Court for the Southern District of Texas, dismissing plaintiff's bill of complaint after final hearing upon the merits. The purpose of the bill was to restrain the Houston Ice & Brewing Company, a dissolved corporation, and certain individuals, who were operating its business as statutory trustees, from selling their bottled beer with such labels and in such dress as would induce the purchasers of it to believe that they were buying plaintiff's product, instead of that of defendants. The basis of the plaintiff's cause of action is (1) an alleged infringement of its several trade marks and (2) unfair competition. The plaintiff's brewery and shipping point is in Milwaukee and that of the defendant in Houston, Texas. Both plaintiff and defendant were engaged in selling bottled beer throughout the state of Texas, and were in direct competition with each other. The plaintiff had for twenty years or more distributed its bottled beer in brown bottles with a brown label. The defendant originally employed only white bottles with white labels, but for several years had used also the brown bottles and in connection with them brown labels. The evidence tended to show that brown bottles were more protective to the beer, and that brown labels were more appropriate when used on brown bottles than were white labels. The defendants had at one time been the distributing agents for the plaintiff's bottled beer in the state of Texas but had ceased to be connected with plaintiff for some time before the suit was filed. The plaintiff contended that defendants' use of brown bottles with brown labels first commenced after the

relations between plaintiff and defendants were severed, but this was disputed by the defendants. There was evidence as to cases
259 of confusion of brands between those of plaintiff and those of defendants and evidence tending to show intentional deception on the part of soliciting agents of the defendants in the sale of their product, but the defendants denied authorization of any deception by their agents. The plaintiff did not rely upon the use by defendants of brown bottles, the evidence showing that it was plaintiff's custom to sell its bottles to other brewers for reuse and to be refilled in the state of Texas. The alleged infringement and unfair competition was based on the use by defendants of a label on its bottles, claimed to have resembled plaintiff's label, so closely as to mislead purchasers into the belief that they were buying plaintiff's product, when they were in fact buying that of the defendants.

It is quite clear that there was no infringement by defendants of any one of the plaintiff's registered trade marks. No one of these trade marks claims any color scheme, as part of the mark. The differences between plaintiff's labels and those of the defendants are so marked in other respects that, in the absence of identity of color, there could be no possibility of confusion between them, and the right to appropriate any specific color, not having been reserved in any of the trade marks, no infringement of them is made out by the plaintiff.

This leaves for consideration the question as to whether the defendants were guilty of unfair competition in offering for sale their bottled beer, in competition with that of the plaintiff, in a dress that would likely deceive the purchaser into believing he was receiving the plaintiff's product. This would constitute unfair competition and justify relief, though the plaintiff failed to establish an infringement of its technical trade marks. The dress of defendants' bottled beer, which gives rise to the complaint of the plaintiff consisted in its having been put up in brown bottles with a brown label, charged to have been imitative of that of the plaintiff. The plaintiff does not contend that either by virtue of its registered trade marks
260 or by virtue of continued use, it has acquired the exclusive right to use either brown bottles or brown labels in bottling its beer. It disclaims any right to a monopoly in the color, brown, in and of itself, as applied either to the containers or labels. Its exact contention is that the dress of its bottled product in brown bottles with brown labels in combination with certain other elements in the label, peculiar to it, is entitled to protection and that defendants by their use of a brown bottle with a brown label, with certain imitative characteristics, has violated its rights. The question, therefore, is whether the two labels are so alike in respects other than their own color and that of the containers, as to make it likely that, because of such other points of resemblance, the product of the defendants might be mistaken by purchasers for that of the plaintiff in the ordinary course of retailing beer. The determinative facts are, therefore, the points of resemblance and dissimilarity, in respects other

than their general color, of the two labels, and their probable effect upon consuming purchasers of the beer.

Before referring to the details of resemblance or lack of it, reference to a few pertinent legal principles will not be out of place. It is well settled that the basis of trade mark rights is the good will of a business, which the mark serves to identify to the purchasing public. Apart from such good will, a trade mark has no recognized value and is not the subject of legal appropriation. Hanover Milling Company v. Metcalf, 240 U. S. 403-414. To constitute a violation of trade mark rights, injury to the good will of the owner's business must appear. The purpose of the law in the protection of trade mark rights is to conserve the good will of the owner's business, indicated by the use of the mark, rather than to protect the purchasing public against the imposition of buying goods believed to be of an origin different from their actual origin. Borden Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed., 510; Hanover Milling Co., v. Metcalf, 240 U. S. 403. Protection of the owner's prop-
261 erty right in the established good will of his business from piracy by the use by others of a mark, which the owner has adopted to represent his product, is the aim of the law and the measure of the rights and obligations arising from it. If the result of the use of the mark by one other than the owner is to enable him to palm off his goods upon buyers as those of the owner, his competitor, an injury to the good will of the business of the owner of the mark results, which the law redresses. The purpose being to protect the owner of the mark rather than the purchasing public, it would seem unimportant whether or not the purchaser used ordinary care to determine the true ownership. If the resemblance was such that even unwary purchasers would likely be misled, injury would result to the owner of the trade mark. The test would seem to be whether the resemblance was such as would likely deceive purchasers of the capacity and under the conditions that the goods would encounter in the course of business of the particular trade. While the owner of the mark is not chargeable with the want of care of the purchasers of his goods, if he is injured by their being deceived by his competitor's mark, yet it is clear that not every deception of customers can be said to be the result of trade mark infringement or unfair competition in the use of similar marks or dress for goods. It is conceivable that purchasers of bottled beer might be misled as to the maker of the beer by the color of the bottle, in the absence of any label on it. It is probable that purchasers of bottled beer are frequently deceived as to its maker by the color of the bottle, together with the color of the label. A brown bottle with a brown label indicates to many the beer of the plaintiff. If they examined no further than the color of the bottle and the color of the label, the deception as to the origin of the beer would be complete, and yet the plaintiff's counsel concedes that neither the brown bottle nor the brown label nor both in combination, apart from other points of resemblance, would establish infringement or unfair competition. All
262 breweries having the right to adopt the use of brown bottles with brown labels, no legal injury can result to any brewer

from a deception caused by the use of brown bottles with brown labels alone. The points of resemblance to justify relief must be in matters which the complaining party has the right to use exclusively. This principle applies to unfair competition as well as to infringement. In the case of Coats v. Merrick Thread Co., 149 U. S. 562-573, the Supreme Court said:

"There is no doubt a general resemblance between the heads of all spools containing a black and gold label which might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this. Having, as we have already held, the right to use the black and gold label, and the periphery embossed with the number of the thread, they were only bound to take such care as the use of such devices, and the limited space in which they were used, would allow. In short, they could do little more than place their own name conspicuously upon the label, to rearrange the number by placing it in the border instead of the center of the label, and to omit loops of the plaintiff's periphery, and substitute their own star between the numerals. Having done this, we think they are relieved from further responsibility. If the purchaser of such thread desires a particular make he should either call for such, in which case the dealer, if he put off on him a different make, would be guilty of fraud, for which the defendants would not be responsible, or should examine himself the lettering upon the spools. He is chargeable with knowledge of the fact that any manufacturer of six-cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name of the manufacturer. * * * Having already held that defendants had a right to make use of the embossed numeral in the periphery, their union of the two devices upon the same spool head, both being originally designed to be used in conjunction, cannot be made the basis of a suit."

In the case of N. E. Awl Co. v. Marlborough Co., 168 Mass. 154, Justice Holmes said for the court:

"The ground of the ruling probably was that the plaintiff did not claim a trademark in boxes or labels, and that its objection to the defendant's boxes was solely because the label was of the same color as the plaintiff's. Of course, a person cannot claim the monopoly of a color in connection with a particular line of trade, and very likely not in connection with the labels of a certain kind of goods generally. But the most universal element may be appropriated as the specific mark of a plaintiff's goods if it is used and claimed only in connection with a sufficiently complex combination of other things. The plaintiff did not claim the exclusive right to brown labels for awls, but it claimed the exclusive use of the brown color in the combination we have described. If the only other element besides the color had been a box of a certain size and a label of a certain shape, the case might be different: Morgan's Sons Co. v. Troxell, 89 N. Y. 292, 42 Am. Rep. 294; but when there is added an inscription, which both in its pictorial aspect of black marks and in its 263 meaning was calculated to confuse, if not deceive, the plaintiff's claim seems to us moderate."

In the case of Continental Tobacco Co. v. Larus Bro. Co., 133 Fed. 727, the court said:

"From an inspection of the exhibits, in connection with the weight of evidence, we think it clearly appears that the matters in which the defendant's plug tobacco is similar to complainant's—that is to say, the size and shape of the plug, the indented marking to assist in cutting off the smaller piece, the use of the indented name of the manufacturer, the use of a yellow tag lettered with the name of the brand—are in common use, and in the present case the manufacturers' names are easily read, and are so dissimilar that there appears to us no ground for the contention that there is an unfair imitation likely to deceive.

"As to actual deception, the proof is not at all convincing; the most that is established is that the plugs look alike, and if the illiterate and inattentive purchaser was guided by the color and size of the circular tag alone, he might mistake one for the other, but that is quite true of almost all forms of manufactured tobacco. The answer of the defendant, sworn to by the originator of the 'Richmond Best Navy' brand, swears that there was never any purpose or intention to imitate the complainant's 'Master Workman' brand, or to attempt in any way to appropriate the trade of the complainant by creating any confusion as to their respective brands.

"It is urged that the illiterate persons, such as those who mostly use this kind of smoking tobacco, look only at the color and size of the tag; but this is not good ground for relief, for we find from the proofs that the color and size of the yellow circular tags is not of itself a distinction which either manufacturer can appropriate."

In the case of Payton v. Snelling, 17 R. P. C. 48, 52, quoted approvingly in United States Tobacco Co. v. M'Greenery, 144 Fed. 531-2, the court said:

"He (the plaintiff) must make out, not that the defendant's are like his by reason of those features, which are common to them and other people, but he must make out that the defendant's are like his by reason of something peculiar to him, and by reason of the defendant having adopted some mark, or device, or label, or something of that kind, which distinguishes the plaintiff's from other goods which have, like his, the features common to the trade. Unless the plaintiff can bring his case up to that, he fails. The evidence is very strong that one tin may be mistaken for the other, very likely; but why? Because of the features common to them and common to all. The only question you have then to consider is whether the defendants' get-up is so like the plaintiffs' as to be calculated to be mistaken for it. But when, as in this case, and in the last, what is called the plaintiffs' get-up consists of two totally different things combined, namely, a get-up common to the trade, and a distinctive feature affixed or added to the common features, then what you have to consider is not whether the defendants' get-up is like the plaintiffs' as regards the common features, but whether that which specially
264 distinguishes the plaintiffs' has been taken by the defendants."

In the case of American Tobacco Co. v. Globe Tobacco Co., 193 Fed. 1015, the court said:

"There are some resemblances in the package but most of them arise from features which have been combined in common use and to which no one has exclusive right.' That anyone is deceived by the size, shape, tin foil, or general makeup of the package, or by its paper, lettering, or color, does not help the complainant's case. All these are old separately and in combination. The complainant must show deception arising from some features of its own not common to the public."

These citations sustain these propositions (1) that the resemblances relied upon by plaintiff must be in points not common to the trade, but in things it had the exclusive right to use, and hence the color of the bottle and the color of the label are to be eliminated; and (2) that the resemblances in other points which admit of exclusive appropriation by plaintiff, must be such as would deceive an ordinary purchaser, buying in the manner in which purchasers usually buy similar goods, and that no distinction is to be made in this respect with regard to the illiterate and unwary.

Applying these principles to the labels used by the respective parties. Whether Exhibit "C" to the bill of complaint is an infringement of Exhibit "A" becomes unimportant in view of the concession in argument by counsel that the two labels, on which the court's determination was sought, were Exhibits "A", plaintiff's label, and Exhibit "J", that last adopted by the defendants, and used by them, at the time of the hearing in the District Court. The latter does not carry the resemblance in the initial capital letter "S" to that of the same letter on plaintiff's label that appeared in the former. The points of resemblance between Exhibit "A" and Exhibit "J" are the white lettering and white marginal lines on the brown background and the blue circle with white lettering in it. The points of
265 dissimilarity are (1) the shape of the label, plaintiff's being rhomboidal, defendant's rectangular; (2) the character of the script; (3) the contents of the blue circle, plaintiff's being a globe, defendants' a red star having in its center a magnolia blossom and leaves; and (4) the inscriptions, there being an entire dissimilarity in this respect, each label showing the respective name of the maker and the distinctive brand of beer.

Eliminating the color of the bottles and the color of the label, as elements of confusion, it seems clear that no one could be misled by the other resemblances between the two labels, since a close enough inspection to reveal them would also reveal the more glaring points of dissimilarity mentioned and to a literate person the difference in the origin of the product, disclosed by the different inscriptions on the two labels. Even an illiterate person could hardly fail to distinguish the differing shape of the labels and the differing character of the script and of the circular inner labels, if they examined them with the slightest attention. We are not to be considered as holding, however, that defendants were under a duty to make their label so different from plaintiff's label that an illiterate person or one who

was so unwary as to be misled by the mere brown color of the bottle and label, would be better informed from the contents of the label, upon so casual an inspection of it. A majority of the court are of the opinion that eliminating the elements that were common to the trade, namely the brown bottle and the brown label, there was enough dissimilarity in other respects between the two labels to justify defendants' use of their label without the imputation of unfair competition.

There is evidence in the record that agents of the defendants advised purchasers of defendants' bottled beer in brown bottles with brown labels, that it might be sold as plaintiff's beer to their customers. The defendants deny any knowledge of any such representations by their agents and deny that any authority was given
266 their agents to make such representations. The District Court found the facts against the plaintiff on this issue and dismissed the bill, either because not satisfied that the representations were made by the agents or if made that they were authorized by the defendants or known to them. Occasional misrepresentation of soliciting agents not shown to have been known or authorized by defendants, would afford no ground of relief on the ground of unfair competition, apart from an improper dress for their goods. A majority of the court are of the opinion that the finding of the District Court in this respect should not be disturbed. Of course, if misrepresentations by the agents of the defendants should in the future, continue to such an extent and over such a period of time as to authorize the inference that they were authorized, either expressly or by acquiescence by the defendants, a question of unfair competition, apart from the use of improper or infringing labels, would arise, the determination of which would not be concluded by the decree in this cause, which in that respect is to be limited in its effect to the conditions existing not later than the date of the decree of the District Court dismissing the bill.

A majority of the court are of the opinion that the decree of the District Court should be affirmed, and it is so ordered.

Judgment.

Extract from the Minutes of April 28, 1917.

No. 2990.

JOSEPH SCHLITZ BREWING COMPANY

versus

HOUSTON ICE & BREWING COMPANY et als.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the South-
287 ern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, ad-

judged and decreed by the Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Joseph Schlitz Brewing Company, and the surety on the appeal bond herein, American Surety Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

268 *Petition for Rehearing.*

Filed May 18th, 1917.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1916.

No. 2990.

JOSEPH SCHLITZ BREWING COMPANY, Appellant,

vs.

HOUSTON ICE & BREWING COMPANY et al., Appellees.

Motion for Rehearing.

To the Honorable the Judges of the Circuit Court of Appeals in and for the Fifth Circuit:

Your Petitioner, Joseph Schlitz Brewing Company, feeling itself aggrieved by the opinion and decree of this Honorable Court, rendered and entered in the above entitled cause on the 28th day of April, A. D. 1917, under and by which a majority of this Honorable Court ordered, adjudged and decreed that the certain decree of the District Court of the United States in and for the Southern District of Texas, made, and entered in said cause on the 11th day of April, A. D. 1916, be affirmed; and further found and held that certain labels adopted by the appellees herein are not infringements
269 of appellant's trade mark label and that the use of such labels by the appellees in interstate and international commerce does not constitute unfair trade against the appellant and an invasion of appellant's property right in its good will; respectfully petitions this court for a rehearing of its said appeal and moves that this court in equity and good conscience grant a rehearing by reason of the manifest errors appearing in the opinion of this court:

The appellant urges and asserts errors in the opinion of this court as the basis of this its petition and motion for a rehearing, as follows, to-wit:

I.

The court says:

"The plaintiff had for twenty years or more distributed its bottle beer in brown bottles with a brown label. The defendant originally employed only white bottles with white labels, but for several years

had used also the brown bottles and in connection with them brown labels. * * * The defendant had at one time been the distributing agent for the plaintiff's bottled beer in the state of Texas, but had ceased to be connected with plaintiff for some time before the suit was filed. The plaintiff contended that defendant's use of brown bottles with brown labels first commenced after the relations between plaintiff and defendants were severed, but this was disputed by the defendants."

This statement by the court appellant urges and asserts is erroneous because and for the reason that:

(*a*) It is undisputed that appellees were agents for the appel-
270 lant from the year 1900 up to July 1st, 1912. (Tr. pp. 67, 68, R. pp. 75, 76; Exhibit Z, Tr. pp. 190, 191, R. p. 211.)

(*b*) It is unudisputed and admitted that appellees commenced using a brown bottle with a brown label bearing white letterpress and other indicia subsequent to July 1st, 1912.

Appellant's proof is to the effect that such a brown bottle and a brown label were first used by appellees early in 1913. (Tr. pp. 68, 69; R. pp. 76, 77.) Appellee's admission is that the brown bottle bearing the brown label was first used by appellee on August 6th, 1913, and that the first shipment of beer so bottled and labeled was made on August 12th, 1913. (Tr. p. 164, R. p. 187;) Invoice for labels is dated September, 1913, Ex. P. (Tr. p. 173, R. p. 198).

II.

The Court says:

"It is quite clear that there was no infringement by defendants of any one of the plaintiff's registered trademarks. No one of these trademarks claims any color scheme as part of the mark. The differences between plaintiff's labels and those of the defendants are so marked in other respects, that, in the absence of identity of color there could be no possibility of confusion between them, and the right to appropriate any specific color, not having been reserved in any of the trademarks, no infringement of them is made out by the plaintiff."

This statement of the court appellant respectfully submits is erroneous because and for the reason that on April 9th 1895, the
271 appellant registered in the United States Patent Office a trademark which consisted of the word "Schlitz" in heavy, characteristic, white script lettering on a background in solid color, as disclosed by the declaration where it further appears, that:

"The color of the background of the trademark, as used with the various brands of bottled malt liquors, varies, and aims to correspond with the color of the beverage, so as to indicate at a glance the brand itself, for example a golden background being applied to a light pale beer, and a darker color to a dark stout beer, and the like."

This registration is numbered 26385 and a copy of the same may be found on page 176 of the transcript and 200 of the record.

The rights under this registration were claimed and reasserted in the Patent Office, Washington, D. C., by the appellant as late as July 16th, 1912, under application filed October 25th 1911, and allowed

and registered as number "87489." (Tr. p. 199, R. p. 219); and are again asserted in trademark registration No. 90587 under date of March 4th, 1913. (Tr. p. 175; R. p. 199.)

The white script lettering used in the word "Schlitz," as registered, was so new, so novel and so characteristic that the word "Schlitz" so displayed was allowed registration although at the time surnames and geographic names were not registerable as such under the law.

It is undisputed that the word "Schlitz" in ornamental, characteristic, white script, appearing upon a background of brown has been used as the trademark label of the appellant on all of its bottled beer distributed in international trade and on 90 per cent of the appellant's bottled beer distributed in interstate commerce. (R. pp. 64, 65, 66, Tr. pp. 57, 58.)

272 IV.

The Court says:

(*a*) "The plaintiff does not contend that either by virtue of its registered trademark or by virtue of continued user, it has acquired the exclusive right to use either brown bottles or brown labels in bottling its beer."

The appellant admits that it did not contend for an exclusive right to use brown bottles.

Appellant, however, respectfully insists that it did contend to have the right both under the law of trademarks and upon the principles of unfair trade to the exclusive use of its brown label in connection with the brown bottle, by reason of the fact that it had used such brown label on bottled beer to the exclusion of the world for a period of twenty years. (Tr. p. 56, Patent Office Copy Registration of Trademark No. 26385. Tr. P. 176, R. p. 200; Tr. p. 58, R. p. 66; Tr. pp. 60-62, R. pp. 68-72; Tr. pp. 74 and 75, R. p. 84. Brief and Argument of Appellant, pp. 67, 68 and 69.)

Appellant further respectfully submits that the bare question of the right to use a brown label upon a brown bottle was not directly in issue in this case, which involved not only defendant's right to use a brown label but also the imitation *all of* the other essential features of appellant's collocation and dress in the identical arrangement used by the appellant, that is to say, the brown label pasted upon the brown bottle, such brown label having white ornamental script lettering thereon, slanting upwards from left to right, a blue figure upon the left side of such label and of such script lettering and white block lettering underneath. The specific issues presented by this case were:

273 First, the infringement of appellant's trademark label originally registered April 9th, 1895, Trademark No. 26385. (Tr. p. 56, R. p. 64; Tr. p. 176, R. p. 200); Second, appellant's common law trademark in the label described in the bill of complaint (Exhibit A) and used by the complainant, to the exclusion of the world for upwards of twenty years.

Third, the invasion of appellant's good will by the appellees by the adoption and use by such appellees, of a brown label with white

letterpress and blue figure thereon, in imitation of the label previously exclusively used by the appellant. Appellant still insists, however, that Schlitz beer is known and sold as the brown label beer and that this brown label, in connection with the brown bottle, regardless of other indicia or lettering employed thereon, is entitled to the protection of the Courts.

(*b*) The Court continues:

"It (appellant) disclaims any right to a monopoly in the color, brown, in and of itself, as applied either to the containers or labels."

Appellant admits that this statement by the court, standing alone and segregating from the other principles of equity from which plaintiff contends and contended is true and correct. However, appellent contended and still contends that the use of a color or a combination of colors, though not subject to exclusive appropriation or claim of property right and monopoly or subject to registration under the trademark laws of this country, nevertheless has been uniformly protected by the courts to an extent which gave the first user a virtual monopoly in the color or colors used, whenever it appeared, that the use by another tended to mislead the public and invade the first user's property right in his good will. Prob-
274 ably the first case recognizing this principal is Knott vs. Morgan, 2 Keen (Eng.), 213 (1836), in which respondent, in an opinion rendered by Lord Langlade, was enjoined from painting his omnibuses the same as complainant's. In other words, colors or combinations of colors by long continued and exclusive user, either in technical trademarks or in the dress of goods, will become impressed with a secondary meaning and will become identified with the product of a certain manufacturer to such an extent that the courts will prohibit their use by another and to that extent grant a virtual monopoly. Appellant respectfully submits that ample authority for this its contention may be found in the brief which it submitted to this court.

(*c*) The Court continues:

"The question, therefore, is whether the two labels are so alike in respects other than their own color and that of the container, as to make it likely that because of such other points of resemblance, the product of the defendants might be mistaken by purchasers for that of the plaintiff in the ordinary course of retailing beer."

The appellant submits with all due respect to this Honorable Court, that the statement just quoted is not the law and never has been the law as applied to cases involving a question of unfair competition. Modern decisions universally recognize that color "is a most important element in all package combinations." Appellant realizes that in this its petition and motion for a rehearing the rules of this court prohibit any argument. It therefore confines itself by respectfully requesting the court to inspect the labels involved in Fair-
275 banks Co. vs. Bell, 77 Fed., 869; 23 C. C. A., 554. Facsimiles of the labels in black and white appear on page 874 of the Federal Reporter and on page 559 of the C. C. A. A reading of the decision of the court and an inspection of the labels will make it

manifest that the only points of similarity between the packages involved was the color of the package, "yellow" and the color of the letterpress, "black," and a further inspection of the labels and marks involved in National Biscuit Co. vs. Swick, 121 Fed., 1004, 1008, and Ohio Baking Co. vs. National Biscuit Co., 127 Fed., 111, 118. In the last two cases mentioned it will be apparent that the one question involved was the use of arbitrary devices in the color white, wholly different in appearance and design, on a background of red.

Appellant also respectfully refers the court to "Manual on Trademark Cases," by Rowland Cox, and the labels there appearing in color as follows:

Annhaeuser Busch Brg. Assn. vs. Clark, p. 457;
Fischer vs. Blank, pp. 525, 526;
McCann vs. Anthony, p. 530.

V.

(1) The Court uses the following language:

"A brown bottle with a brown label indicated to many the beer of the plaintiff. If they examined no further than the color of the bottle and the color of the label the deception as to the origin of the beer would be complete, and yet plaintiff's counsel conceives that neither the brown bottle nor the brown label nor both in combination, apart from other points of resemblance, would establish infringement, or unfair competition."

276 (*a*) Appellant respectfully submits that it did not seek to establish in the present case the fact that a brown bottle with a brown label, without other simulated elements, meant Schlitz beer to the purchasing public. It did not conceive that the issues in the case had been narrowed to this inquiry. However, if the proofs in this case, as far as appellant has furnished them, lends substantial support to the finding of this Honorable Court that a brown bottle with a brown label indicates to many the beer of the appellant, then and in that event, appellant respectfully submits that it is entitled to an injunction against the appellee for unfair competition and to protection from an invasion of its good will. If a brown bottle bearing a brown label has by long and continuous user, become so associated in the public mind with the product of the appellant, appellant respectfully submits that it is the duty of this Court not only to grant appellant relief, but to protect the public against fraud.

(*b*) Appellant respectfully enters protest against the Court's statement that its counsel conceded that neither the brown bottle nor the brown label, nor both in combination, apart from other points of resemblance, would establish infringement or unfair competition. Appellant not only protests against this statement of the Court, but its counsel, who certify to this petition and motion, join in the protest. Such a concession on the part of either the appellant or its counsel implies a renunciation of trademark rights, of property rights in good will, of rights under the principles of equity as enunciated in the decisions of the Federal Courts in cases involving unfair competition which the appellant has sought to maintain and has

maintained for a period of twenty years, not only in the Courts
277 of this country, but in the Courts of foreign lands, as well.

It stands undisputed in the record before this Honorable Court that the appellant has sedulously guarded the use of its brown label. The several instances where this label was simulated or sought to be simulated, and the action taken by the appellant in each instance are before this Court. The appellant respectfully urges and asserts that among these several instances there are but few which even approach appellees label in vicious and studied imitation of all characteristic and essential features. Appellant respectfully submits that it should be accorded a rehearing with a view of having the language of the Court just quoted modified and the aspersion on appellant's counsel therein contained expunged.

(2) The Court uses the following language:

"All brewers having the right to adopt the use of brown bottles with brown labels, no legal injury can result to any brewer from a deception caused from the use of brown bottles with brown labels alone."

The appellant, with all due deference to this Honorable Court, which it respects and honors, submits that there is nothing whatever in the record to warrant this conclusion. Its reasons for this statement may be briefly summarized as follows:

(*a*) Appellant was the first to put into general use a brown bottle as a container of bottled lager beer.

(*b*) Appellant was the first to use on bottled lager beer, whether bottled in brown, green, white, or any other color, a label having a solid body color other than white.

(*c*) Appellant was the first to use on bottled lager beer,
278 regardless of the color of the bottle, a label having for the body color the color brown, and to maintain its rights to use a brown body colored label on bottled lager to the exclusion of the world for the past twenty years.

(*d*) The appellant, by reason of its adoption of a solid body color other than white for its label, was thereby enabled to be the first and was the first to use a letterpress in the color white on its labels.

(3) The Court says:

"The points of resemblance to justify relief must be in matters which the complaining party has the right to use exclusively. This principle applies to unfair competition as well as to infringement."

The appellant respectfully begs leave to submit that this is an erroneous statement of the principles of equity which govern cases of this character.

"The right to use exclusively" is a right which the law accords to the originator and user of an arbitrary and fanciful creation which may be the subject of trademark rights. The law of unfair competion found its birth in the inability of courts of equity to grant relief in cases where an "exclusive right of user," was not involved. It was invoked only in cases where the simulation complained of related to elements or indicia, the use of which was, primarily, common to the public—was a matter of public right (publici juris).

Appellant submits that courts of equity, guided by the principles

of the law of unfair compet-ion, have extended protection even to the form and shape of an article (lozenge) and the form and shape of the package in which it was contained, as the court did in Sterling Remedy Co. vs. Spermine Medical Co., 112 Fed., 1000; that
279 courts have extended protection even to the color of a beverage as the court did in Coca Cola Co. vs. Gayola Co., 211 Fed., 912; where the particular form or shape or color (to quote this court) "indicated to many the beer (product) of the plaintiff."

The appellant further respectfully submits that none of the cases cited by this court in any way substantiate the statement of this court. Before commenting upon the cases cited appellant respectfully calls attention to the difference between "exclusive user" and "the right to use exclusively."

In the cases of Coats vs. Merrick Thread Co., 149 U. S., 562-573; Continental Co. vs. Larus Bros. Co., 133 Fed., 727; U. S. Tobacco Co. vs. McGreenery, 144 Fed., 521-2, and American Tobacco Co. vs. Club Tobacco Co., 193 Fed., 1015, no question of exclusive user is involved. In each case the elements were common to the trade and had been in use either by the defendant or others for years prior to their adoption by the complainant.

In the present case, appellant had been the exclusive user of a brown label for twenty years.

The case of N. E. Awl Co. vs. Marlborough Co., 168 Mass., 154, is in harmony with the position of the appellant in this cause, in that the court holds that the color of the brown label in combination with the other features in its pictorial aspect was calculated to confuse the public and granted the relief prayed for. However, Justice Holmes' decision is not as broad and far reaching as the doctrine of unfair trade promulgated in recent decisions of the Federal Courts, to which appellant directed this court's attention.

280 VI.

The Court says:

"Whether 'Exhibit C' to the bill of complaint is an infringement of 'Exhibit A' becomes unimportant in view of the concession in argument by counsel that the two labels on which the court's determination was sought were 'Exhibit A,' plaintiff's label, and 'Exhibit J,' that last adopted by the defendants and used by them, at the time of the hearing in the District Court."

Appellant and its counsel respectfully submit that no such concession was made and no such concession was intended. The facts in the record and the brief of appellant presented to this court for determination the rights of the parties under both of the infringing labels "C" and "J."

The shifting of the labels was wholly the work of the appellees. The complaint was filed against the first label and issue joined thereon. The pretended abandonment of the characteristic "S" and triangular paraph which were exact copies of similar letters and devices on appellant's label amounted to a confession of fraud which should on the face of the record have entitled appellant to relief.

Appellees pretended to discontinue the use of the first objectionable label Exhibit "C" in October, 1913. (Tr. pp. 30 and 31.) The answer of the appellees subscribed and sworn to by H. Hamilton, President of the Houston Ice & Brewing Company, April 16, 1914, gave assurance to the court that the appellee had adopted and intended to use Exhibit "J." (Tr. p. 31.) Counsel directs the court's attention to the fact that the only change made in Exhibit
281 "C" to Exhibit "J," was the elimination of two of the features copied from the appellant's label, the characteristic "S" and the paraph. On May 21, 1913, the Houston Ice & Brewing Company, by R. L. Autrey, its Vice-President, filed application for trademark in the particular design of the letterpress including the fact simile copy of appellant's characteristic "S" and triangular paraph, and containing the circular trademark seal of Texas in Exhibit "C." (Tr. p. 201.) It advertised in the Houston Daily Post up to within a few weeks of the trial the picture of bottle bearing the peculiar design of letterpress and other elements present in label originally complained against in the bill of complaint. (Tr. p. 200.) It procured within a short time of the trial signs imitative of signs used by the appellant with color, letterpress and arrangement of elements identical with those complained of in the bill of Complaint, Exhibit "C." The defendant, although professing to avoid infringement of the complainant's label by abandoning the use of Exhibit "C" was in fact in many cases still continuing to use in advertisements, labels containing all of the features of Exhibit "C" originally complained against. (Complainant's Ex. 10, a glass sign fac-simile copy of label in colors imitative of complainant's Ex. Y 2.) Appellant submits that no more studied attempt on the part of one manufacturer to appropriate the badge of a rival can be found in the printed cases, or conceived of, and the prosecution by the appellant of this cause for the adjudication of its rights by reason of such alleged infringement, are inconsistent with the idea of limiting the issues in this cause. Appellant respectfully submits it is entitled to an injunction on the first label. There is nothing in the record to prevent appellant from again using the first label.

282 VII.

The Court in its opinion says:

"A majority of the court are of the opinion that eliminating the elements that were common to the trade, namely the brown bottle and the brown label, there was enough dissimilarity in other respects between the two labels to justify defendant's use of their label without the imputation of unfair competition."

The appellant admits, for the purposes of this petition and motion, that granting the premise the conclusion of the court is correct. Appellant submits that it is likely that it would not now be appealing to this court of conscience had appellees' product been marketed in a white bottle bearing a green label with the letterpress and all other indicia similar to the label complained of. It is likely that appellant would not now be appealing to this court of conscience had appellee's

product been bottled in a brown bottle bearing a blue or red label with letterpress and other indicia indentical with the letterpress and other indicia of the label now complained of.

Appellant, however, solemnly urges and asserts that this Honroable Court has not arrived at the true tests or at the true principles of equity which determine causes involving trademark infringements or unfair competition.

Appellant respectfully submits that in the determination of causes of this character a court of equity must consider the manner in which complainant's product is marketed as a collocation—as an assemblage of elements—which create a picture in the public mind. It submits, to quote Judge Jenkins, that "a specific article of approved
283 excellence comes to be known by certain catchwords easily retained in memory, or by a certain picture which the eye readily recognizes. The purchaser requires only to use that care which persons ordinarily exercise under like circumstances. He is not bound to study or reflect, he acts upon the moment. He is without the opportunity of comparison. It is only when the difference is so gross that any sensible man, acting on the instant, would be deceived, that it can be said that the purchaser ought not to be protected from imposition. Indeed, some cases have gone to the length of declaring that the purchaser has a right to be careless and that his want of caution in inspecting brands of goods with which he supposes himself to be familiar, ought not to be allowed to uphold a simulation of a brand that is designed to work a fraud upon the public. However that may be, the imitation need only be slight if it attaches to what is most salient, for the usual intention of a purchaser renders a good will precarious if exposed to imposition."

The appellant respectfully submits that in arriving at the equities in this case, this Honorable Court should have taken into consideration the following facts:

a. The brown bottle, as a portion of the collocation, the mental picture, whether appellant had the exclusive right to use a brown bottle or not.

b. The brown label as a part of the collocation or mental picture, whether appellant had the exclusive right to use a brown label or not.

c. The brown bottle and the brown label in connection with the white script lettering, whether appellant had the exclusive right to use such white script lettering or not.

d. The blue figure, the other letterpress in white, the marginal line in white and the general arrangement of all of these
284 elements on the brown label.

In other words, appellant respectfully submits that it was the duty of this Court to take into consideration all of the elements which went into the making of the package in which appellant's product was marketed, and by means of which it was identified by customers.

Appellant further respectfully submits that the brown label was not "common to the trade." It respectfully submits that it was unusual, and it was first originated by the appellant and that it has

been used and its use protected by appellant for twenty years to the exclusion of the world.

Appellant respectfully submits that the term "common to the trade" must not be confused with the term "common right." There is a wide distinction. Elements and indicia, the use of which is a matter of common right, may not be matters which are "common to the trade." The use of the color brown on a beer label is primarily a common right, but it is not common to the trade, because the appellant was the only one to use it. The common right to use these elements and indicia abates when through long, continuous and exclusive use they have become the means of identification in the public mind of some article of commerce and have thereby become part and parcel of some good will.

In Conclusion.

And now, therefore, to the end that equity may be done and that the relief in appellant's bill and herein prayed for, and such other and further relief as it may be righteous to administer in the premises, may be accorded to the appellant, may it please Your Honors,
such relief fully to grant and to allow the appellant's motion
285 for a rehearing of its cause by order duly entered, but upon
such terms and under such conditions as Your Honors in equity and good conscience may determine.

And the appellant in duty bound will ever pray, etc.

JOS. SCHLITZ BREWING CO.

Certificate of Counsel.

The undersigned, counsel for the appellant and petitioner, hereby certify that we have examined the matters, facts and things set forth in the respective grounds for a rehearing referred to in the preceding petition; that we are of the opinion that the grounds for such rehearing are well founded in point of law; that the said grounds for rehearing are true in point of fact, and that this petition for rehearing is not made for the purposes of delay.

Dated Milwaukee, Wisconsin, May 16th, 1917.

THEO. KRONSHAGE, JR.
RUSSELL JACKSON,
J. W. McMILLAN.

286 *Reply to Petition for Rehearing.*

Filed May 28th, 1917.

In the United States Circuit Court of Appeals, Fifth Circuit, November Term, 1916.

No. 2990.

JOSEPH SCHLITZ BREWING COMPANY, Appellant,

vs.

HOUSTON ICE & BREWING COMPANY et al., Appellees.

Reply to Motion for a Rehearing.

To the Honorable the Judges of the Circuit Court of Appeals in and for the Fifth Circuit:

To only one part of the motion for a re-hearing do appellees deem it necessary to say a word in reply. This is Section VI, pages 13 and 14, of the motion.

Appellant would question the good faith of the statement made by appellees, first, by their counsel, before suit was filed, and later by their answer, as soon as answer was required, that on account of the objection made by appellant they would change the form of the label shown as Exhibit "C." (Tr., p. 17.) They say (page 14):

"It (referring to the Houston Ice & Brewing Company) advertised in the Houston Daily Post up to within a few weeks of the
287 trial the picture of bottle bearing the peculiar design of letterpress and other elements present in label originally complained against in the bill of complaint."

This advertisement was simply a newspaper advertisement appearing, of course, in black and white, and suggested nothing of the Joseph Schlitz Brewing Company. (Tr., p. 200.) In printing the advertisement, the newspaper used a cut of the bottle made before the controversy arose. It so happened that in the same paper, just two weeks later, there appeared another advertisement, and the cut had been changed (defendant's Exhibit "N," Tr., p. 210). Mr. Autrey testified about this as follows (Tr., p. 172):

"The cut for the advertisement which appeared in the Houston Post of March 14th, which contains the 'S' the use of which was virtually abandoned, was made when we first began to make our bottle beer, and long prior to the hearing in Galveston.

"The advertisement which appeared in the Houston Post of March 28th, 1915, and which is marked Exhibit 'N' is a new cut, and the form of the 'S' has been changed."

There was never any pretense or claim on the trial in the court below, in the brief or in the argument on appeal, that the abandonment by the Houston Ice & Brewing Company of Exhibit "C" had

not been made or was not being carried out in perfect good faith. Not only this, but this was assumed to be true by appellant in its brief and argument. In describing the alleged similarities between the two labels (its brief, pages 73 and 74), no claim whatever is made of similarity between the "S" used in writing "Southern Select"
and the "S" used in writing "Schlitz," which would have been
288 one of the most prominent claims made if appellant had not, itself, understood and assumed that the earlier label had been abandoned and was no longer in the case. Besides, on page 14 of its brief, it speaks of "the changes which respondents made," referring to the adoption of the new label in lieu of the old.

No proof was offered that defendant was using the abandoned label, and therefore the decree of the court below dismissing the bill was technically correct, as well as being framed in response to the real issue.

As to the further statement by appellant that "the defendant, although professing to avoid infringement of the complainant's label by abandoning the use of Exhibit 'C' was in fact in many cases still continuing to use in advertisements labels containing all of the features of Exhibit 'C' originally complained against"—it can be simply said that it is not supported by the record.

Respectfully submitted,

BAKER, BOTTS, PARKER & GARWOOD,
Solicitors for Appellees.

May 26, 1917.

289 *Order Denying Rehearing.*

Extract from the Minutes of October 4th, 1917.

No. 2990.

JOSEPH SCHLITZ BREWING COMPANY

versus

HOUSTON ICE & BREWING COMPANY et als.

Ordered that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of
Appeals for the Fifth Circuit, do hereby certify that the pages
290 numbered from 257 to 289 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States

Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2990, wherein Joseph Schlitz Brewing Company is appellant, and Houston Ice & Brewing Company, et als., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 256 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the
291 City of New Orleans, Louisiana, this 11th day of December, A. D. 1917.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

292 In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2990.

JOSEPH SCHLITZ BREWING COMPANY, Appellant,

versus

HOUSTON ICE & BREWING COMPANY et al., Appellees.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 12th day of April, A. D. 1918, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

Supreme Court of the United States of America.

#808.

JOSEPH SCHLITZ BREWING COMPANY, Petitioner,

vs.

HOUSTON ICE & BREWING COMPANY et al., Respondents.

It is stipulated and agreed by and between the respective parties to the above-entitled cause, by and between their respective
293 solicitors and counsel:

That the certified transcript of the record, in the above-

entitled cause, heretofore made by the Clerk of the Circuit Court of Appeals for the Fifth Circuit and filed with the Clerk of the Supreme Court of the United States, with petition for a Writ of Certiorari directed to the Circuit Court of Appeals for the Fifth Circuit, shall be taken as a return to the Writ of Certiorari granted by the Supreme Court of the United States on the 4th day of March, 1918, and duly issued by the Clerk under date of the 16th day of March, 1918.

It is further stipulated and agreed that there may be transmitted to the said court for use upon the argument of said cause before the Supreme Court, the following physical exhibits.

The original depositions of E. A. Bielfeld and A. C. Bauman, to which are attached the following labels in colors, not printed in the said record and of which no copies are available.

Complainant's Exhibit "F," copy of brown label of "American" Brewing Company, New Orleans.

Complainant's Exhibit "G," copy of brown label, Petersen's standard beer.

Complainant's Exhibit "H," copy of brown label, Empire Beer, A. Kuhfeld, Proprietor.

Complainant's Exhibit "I," copy of brown label, white lettering and blue figure.

Complainant's Exhibit "J," copy of brown label "Scales" beer, with blue figure of horse shoe.

Complainant's Exhibit "K," copy of brown label, Eckers "Bohemian" lager.

Complainant's Exhibit "L," copy of brown label "Schultz" beer, with blue football on said label.

Complainant's Exhibit "M," copy of brown label, "Special Brew," blue picture of Chief Pocatello thereon.

294 Complainant's Exhibits "N & O." Two photographs, each three bottles of "Blitz," three bottles of Schlitz Beer marked A. Scarboro, Bayrouth, Syria.

Complainant's Exhibits "BB, BB1, BB2 and BB3," being proofs of magazine advertisements.

Complainant's Exhibits "CC, CC1, CC2, CC3 and CC4," being proofs of newspaper advertisements.

Complainant's Exhibit "DD" being a "Beware of Imitations" circular sent out by the complainant.

The following physical exhibits incapable of being printed and made a part of the record or such thereof as may be deemed necessary by counsel for either party for their own use in the argument of said case before the Supreme Court of the United States.

1. Complainant's Exhibit "B," filed with the complaint, being a small sized bottle of Schlitz beer in dark amber or brown bottle, with brown labels thereon, also marked on hearing of this cause, "Defendant's Exhibit "W."

2. Complainant's Exhibit "D," filed with complaint, being a specimen bottle of defendant's product put up in brown bottle with brown label, also marked on hearing of the cause as Defendant's Exhibit "R."

3. Complainant's Exhibit "E," filed with complaint, being speci-

men bottle of Defendant's original Southern Select Beer put up in clear glass bottle with white label thereon, also marked on the hearing of this cause, "Defendant's Exhibit "U."

4. Complainant's Exhibit "4" for identification, being specimen bottle "Schober Beer," in brown bottle with brown label.

5. Complainant's Exhibit "7," being a catalogue of Milwaukee Lithographing & Engraving Co., this company having gone out of business in 1902.

6. Complainant's Exhibit "8" being a catalogue of Milwaukee Lithographing Co.

7. Complainant's Exhibit "10," being glass sign picture of Southern Select brown label.

8. Complainant's Exhibit "11" being page of Houston Daily Post, March 14th, 1915, showing advertisement, Southern Select beer.

9. Complainant's Exhibit "14," being brown specimen quart bottle of Southern Select Beer in brown bottle with brown label first used by defendant.

295 10. Complainant's Exhibit "15" being specimen quart bottle of Southern Select beer with label of brown color, white lettering and the blue figure as first changed by defendant.

11. Complainant's Exhibit "Y," offered in evidence and filed with the depositions of E. A. Bielfeld, being a plaque showing the interior of a smithy, with a man and woman in the foreground and showing facsimile in color, about the size of a quart bottle, a bottle of Schlitz Beer in brown bottle with brown label.

12. Complainant's Exhibit "Y-2," offered in evidence and filed with the depositions of E. A. Bielfeld, being a glass wall sign with brass back, a picture in colors, or brown label of Jos. Schlitz Brewing Company, used upon and in connection with the sale of its beer in brown bottles.

13. Complainant's Exhibit "Y-3," offered in evidence and filed with the depositions of E. A. Bielfeld, being a wall sign of glass having printed thereon the picture of a blue globe, surrounded with red belt, upon which is the word "Schlitz," and the word "trade mark" on the loose end of the belt, and underneath said picture of globe is the picture of Schlitz light brown label in colors.

14. Complainant's Exhibit "Y-4," offered in evidence and with the depositions of E. A. Bielfeld, being the picture of a quart sized bottle of Schlitz Beer in natural coloring, showing prominently thereon the light brown body colored label, lettering and insignia, with the picture of a winged woman upon a pedestal in the background.

15. Complainant's Exhibit "Y-5," offered in evidence and filed with the depositions of E. A. Bielfeld, being a black glass sign on an easel having printed thereon the picture of Schlitz light brown label.

16. Complainant's Exhibit "Y-6," offered in evidence and filed with the depositions of E. A. Bielfeld, being a glass, blue background easel sign, with the picture of Schlitz light brown label and of its features in colors.

17. Complainant's Exhibit "Y-7," offered in evidence and filed

with the depositions of E. A. Bielfeld, being a glass sign picture in colors of a large size bottle of Schlitz beer, showing prominently thereon the light brown body colored label in colors, and underneath the words, "We sell it."

18. Complainant's Exhibit "Y-8" offered in evidence and filed with the deposition of E. A. Bielfeld, being a glass corner sign similar to Complainant's Exhibit Y-7, being a circular glass bearing the said bottle in color, with said label in color prominently imprinted thereon.

19. Defendant's Exhibit "N," being a copy of the Houston Daily Post, Sunday Morning March 28th, 1915.

296 20. Defendant's Exhibit "O," being a page of labels each having a paraph underneath, offered by the defendant.

21. Complainant's Exhibit "T," being a specimen bottle of Southern Select, with second modification of brown label.

22. Defendant's Exhibit "U," being a specimen bottle of Southern Select beer in brown bottle, with third modification of brown label.

23. Defendant's Exhibit "X," being a brown bottle having pasted thereon a brown label bearing the words "Roby Beer, Tampa, Fla."

24. Defendant's Exhibit "Y," being a brown bottle having pasted thereon a label, "Briggs Beer, Elmira, N. Y."

25. Defendant's Exhibit "Z," being a carton for holding four bottles of Southern Select Beer with printed matter thereon.

Dated March 20th, 1918.

(Signed) RUSSELL JACKSON,
(Signed) THEODORE KRONSHAGE, JR.,
(Signed) J. W. McMILLAN,
Of Counsel for the Appellant and Petitioner.

(Signed) JESSE ANDREWS,
(Signed) WALTER H. WALNE,
Of Counsel for the Respondent.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Pursuant to said stipulation, I transmit herewith, as part of my return to said writ of certiorari, the physical exhibits as set forth in said stipulation.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 22nd day of April, A. D. 1918.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

297 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable t
Judges of the United States Circuit Court of Appeals for the Fif
Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit
which Joseph Schlitz Brewing Company is appellant, and Houst
Ice & Brewing Company et al. are appellees, No. 2990, which suit w
removed into the said Circuit Court of Appeals by virtue of
appeal from the District Court of the United States for the South
District of Texas, and we, being willing for certain reasons that
said cause and the record and proceedings therein should be certi
by the said Circuit Court of Appeals and removed into the Supre
Court of the United States, do hereby command you that y
298 send without delay to the said Supreme Court, as afores
the record and proceedings in said cause, so that the s
Supreme Court may act thereon as of right and according to l
ought to be done.

Witness the Honorable Edward D. White, Chief Justice of t
United States, the sixteenth day of March, in the year of our L
one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26,275. Supreme Court of t
299 United States, No. 808, October Term, 1917. Joseph Schl
Brewing Company vs. Houston Ice & Brewing Company
al. Writ of Certiorari. Dated 12th day of April, 1918. Frank
Mortimer, Clerk of the United States Circuit Court of Appeals.

[Endorsed:] 808/26275. No. 2990. United States C
300 cuit Court of Appeals for the Fifth Circuit. Joseph Schl
Brewing Company, Appellant, vs. Houston Ice & Brewi
Company et als., Appellees. Writ of Certiorari, and return there

[Endorsed:] File No. 26,275. Supreme Court U. S., Oc
301 ber, 1917. Term No. 326. Joseph Schlitz Brewing Co., P
tioner, vs. Houston Ice & Brewing Co. et al. Writ of c
tiorari and return. Filed April 25, 1918.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No. ——

JOSEPH SCHLITZ BREWING COMPANY, Complainant and Appellant,

vs.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDART, JESSE ANDREWS, JOSEPH F. MEYERS, B. A. RIESNER and D. ROSSI, as Trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20th, 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company, Defendants and Respondents.

Petition for a Writ of Certiorari requiring the United States Circuit Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States for its review and determination of the case of Joseph Schlitz Brewing Company, Complainant and Appellant, vs. Houston Ice & Brewing Company, et al., Defendants and Respondents, No. 2990, submitted and argued in the October Term, 1916, on the 27th day of February, 1917, in said term and decided April 28th,

1917. Petition for Rehearing duly filed May 18th, 1917, and rehearing denied October 4th, 1917, and mandate returned to the District Court October 25th, 1917.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Joseph Schlitz Brewing Company respectfully shows to this Honorable Court as follows:

First: That the petitioner is a corporation duly organized and existing under the laws of the State of Wisconsin, with its home office and principal place of business in the City of Milwaukee in the State of Wisconsin, and is engaged, among other things, in the sale of beer in bottles in commerce between the several states, including the States of Louisiana and Texas, and in foreign countries, including Mexico.

That the defendant, Houston Ice & Brewing Company, a Texas corporation, with its principal place of business in the City of Houston, in the State of Texas, was during the years 1902 to June, 1912, a wholesale agent for the petitioner and also engaged in the marketing and sale of beer in bottles in commerce between the States of Louisiana and Texas, and in foreign countries, including Mexico, in competition with petitioner. That the defendant, Houston Ice & Brewing Association, is a voluntary organization, successor to the Houston Ice & Brewing Company, and the personal defendants are its Trustees and Trustees under the Statutes of Texas of the dissolved corporation, Houston Ice & Brewing Company, and are all citizens and residents of the State of Texas.

Second: The petitioner, Joseph Schlitz Brewing Company, brought a suit in equity against the respondent, Houston Ice & Brewing Company, in the United States District Court for the Southern District of Texas, charging the respondent with infringement of its trade-mark label and unfair trade. The trade-mark label of petitioner originally adopted in 1894 is a parallelogram in solid body-color brown, pasted upon brown bottles containing petitioner's beer, and bears on the face thereof white, characteristic script and block lettering and the figure of a blue globe in distinctive arrangement. Such trade-mark label has been exclusively used by petitioner in commerce between the several states and in foreign countries, including the States of Louisiana and Texas and Mexico, where the defendant had done business for upwards of twenty years. This label is used in two sizes and is shown in color, letter-press and insignia thereon in the printed transcript submitted herewith, Exhibit "A" on page 17, the quart bottle size, and Exhibit "B," page 27, the pint bottle size. This trade-mark label was originally adopted because of its unique features. Application for registration was made in February, 1895, in the United States Patent Office and the label duly registered April 9th, 1895, trade-mark No. 26,385. Reference to the color of the background is made as follows:

> "The color and background of the trademark as used with the various brands of malt liquors varies, and aims to correspond with the color of the beverage so as to indicate at a glance the brand itself."

The rights under this registration were re-asserted in the Patent Office at Washington, D. C., by the petitioner as late as July 16th, 1912. (Trans. p. 56.) The

particular light-brown body-color upon the labels, Exhibit "A" and Exhibit "B," is the color used since the adoption of the label in 1894, upon all export beer in bottles put up and labeled by the petitioner at the brewery. Export beer is the brand customarily sold in commerce between the several states, including Louisiana and Texas and in foreign countries, and the small size label, Exhibit "B" on page 27 of the Transcript was the label used on the bottles contained in 817 car-load and half car-load shipments ordered by the respondent while agent of the petitioner, to be delivered to Texas and Louisiana points between the years 1902 and 1912. The specific charge of infringement and unfair trade is that the respondent after it ceased to be the agent of petitioner and in the summer of 1913 commenced to use upon beer of the respondent in brown bottles, a brown body-colored label in similitude to the label originally adopted and up to that time exclusively used by the petitioner to distinguish its product. (This label is shown in the Transcript of Record on page 17.) That by reason of the adoption of such imitative mark the public were led to believe that beer of the respondent so labeled was the beer of the petitioner.

Third: Respondent filed an Answer and among other things alleged that by reason of the differences in the wording upon the two labels used by it and the petitioner, there was sufficient differentiation. Respondent admitted the adoption of the brown body-colored label, but claimed the adoption by it of a brown label was merely to provide harmony between the color of the label and the color of the brown bottle which respondent had adopted for alleged scientific reasons. Respondent further admitted that the beer sold by the respondent,

while a jobber for the petitioner's product, was put up in pint bottles bearing the small size pint label, Exhibit "B," on page 27 of the Transcript. Respondent disclaimed any intention to defraud petitioner and voluntarily offered to change the label, and on the hearing of the motion for preliminary injunction soon after issue joined, submitted a new design, respondent's Exhibit "J," shown on page 31 of the Transcript, in which the characteristic "S" imitative of the petitioner's "S" upon respondent's first label was changed, and Judge W. T. Burns, United States District Court, denied petitioner's motion for a preliminary injunction.

Fourth: Thereafter in March, 1915, the cause came on for hearing before the Honorable W. T. Burns, District Judge for the Southern District of Texas, and at that time it developed that the respondent had again voluntarily changed the style of "S" in the script lettering upon the label. There was no controversy as to the important facts relied on by petitioner; that petitioner had first adopted the solid body-colored trade-mark label in 1894; that the label was registered in the United States Patent Office in 1895; that the petitioner had used the trade-mark label with brown background, white letter-press and blue figure thereon for more than twenty years, and had protested and stopped the use of labels having those characteristic features, as alleged infringements, in every instance that had come to the knowledge of the officers or agents of petitioner until the acts of the respondent complained of.

Petitioner also showed instances of passing and palming off of respondent's product marked with brown label, for product of petitioner, confusion caused thereby and

acts of unfair trade for which respondent disclaimed responsibility, but which the similitude of its package to that of petitioner's made possible.

Respondent admitted it had been a jobber of petitioner's product for ten years from 1902 to 1912, and that in the summer of 1913, it had first used the brown label upon beer in brown bottles, but denied any intention to defraud petitioner by the use of such brown label.

Respondent asserted on the argument that petitioner could have no monopoly of the color of such label and that the wording upon the respondent's label was distinct and different from the wording on petitioner's label. The District Court on April 11th, 1916, ordered the Bill of Complaint dismissed without findings of fact or opinion, and a final decree dismissing said bill was entered on that date.

Fifth: Thereupon your petitioner appealed to the United States Circuit Court of Appeals for the Fifth Judicial Circuit and assigned as error, the dismissal of petitioner's Bill of Complaint, among other things, because the issues and proofs at the trial had established the facts.

That the petitioner was the first and original appropriator of and had exclusively used the trade-mark label, Exhibits "A" and "B," in the color, arrangement of elements and letter-press thereon upon and in connection with the marketing and sale of beer in bottles for upwards of twenty years; that it had diligently asserted its exclusive right to use such label throughout the entire time after its adoption and had prevented by notice and appropriate court action every attempted infringement of the trade-mark label, Exhibit "A" and "B," and the color, letter-press and arrangement of

elements, in combination, which make up the trade-mark label of the petitioner.

Petitioner also claimed on appeal that the District Court erred in not finding that the respondent, having knowledge of the petitioner's exclusive right to the use of the brown label, was bound in equity and good conscience, when it entered the field previously exclusively occupied by the petitioner, that is, the marketing of beer in brown bottles with the brown label and the other elements thereon to so distinguish its label and dress of package that confusion would be impossible, and that imitation of the several important elements of petitioner's label under these circumstances entitled petitioner to the relief prayed for.

Petitioner further claimed that it was entitled to the relief prayed for upon the mere inspection of the labels, but upon the hearing of said cause offered evidence of passing and palming off of respondent's product marked with the imitative label complained of, as and for beer of the petitioner, and that agents of the respondent had tried to induce customers of petitioner to buy respondent's beer with brown label, to sell in place of petitioner's, though the officers of respondent denied either responsibility for or knowledge of such unfair dealing, and upon this evidence petitioner was entitled to the relief prayed for.

But the majority of the Circuit Court of Appeals in its opinion, filed on the 28th day of April, 1917, affirmed the decree of the District Court, reported in Volume 241 of the Federal Reporter at pages 817 to 824.

Sixth: Thereupon the petitioner, feeling itself unjustly and inequitably deprived of its trade-mark rights

by the dismemberment of its trade-mark by the majority of the Circuit Court of Appeals, and that the Court ought to have the opportunity to correct this error in the opinion and have the opportunity to apply the law and the former decisions of this Honorable Court and of the other Federal Courts to the facts disclosed by the record in this case, seasonably made a motion for a rehearing of the said case because of the manifest deprivation of the petitioner's rights, contrary to the established principles of the law of trade-marks.

Among other things petitioner directed the court's attention to the record where it was disclosed that the trade-mark of the petitioner as used in commerce between the several states and foreign countries, had been registered in 1894 and 1906 (Trans. pp. 176-199-175), that the color of background was indicative of the particular brand of beer, and that for twenty years before the trial the trade-mark label, in the color of background, style of letter-press and arrangement of elements thereon, shown in Exhibits "A" and "B," Trans. pp. 17 and 27, had been used by petitioner to the exclusion of the world, except for the alleged infringement by respondent in adopting the label, Exhibit "D," p. 17 of said Transcript. (Trans. pp. 176-58-60-62-74-75.)

Because the Circuit Court of Appeals refused to apply the principles of law as to the right of the owner of a trade-mark to claim as a trade-mark the color in combination with other distinctive elements, for example, the distinctive color of background, arrangement, style and color of letter-press and the blue figure, in distinctive combination, petitioner's distinctive arrangement of element, as used on a brown bottle for twenty years.

Because the Circuit Court of Appeals by *eliminating* the color of the label when it should have considered the color *in combination with other elements,* decided the rights of petitioner upon a device not used or claimed by petitioner as its mark, and not disclosed by the record. Counsel for the petitioner respectfully urged the court to consider the color as an essential element in the combination with other elements that go to make up the petitioner's trade-mark label, and award it the protection which the facts warranted, but the Circuit Court of Appeals on October 4th, 1917, denied petitioner's motion for a rehearing, and on the 25th day of October, 1917, mandate was issued to the District Court and the order of the District Court dismissing the Bill of Complaint made final.

Seventh: Petitioner respectfully submits that the reasons why it is entitled to a review of this cause are,

Because the Circuit Court of Appeals was without jurisdiction or authority to decide the case upon the dismembered mark referred to in the opinion, when the record established a trade-mark right in the petitioner to the trade-mark label, Exhibits "A" and "B," pp. 17 and 27 of the Transcript.

Because the majority of the Circuit Court of Appeals in its decision in this case refused to follow the principles of trade-mark law which guarantees protection to the first appropriator of a complex combination of elements as a trade-mark, of which an essential element may be the color.

Petitioner respectfully submits that the correction of the errors in the decision of the Circuit Court of Appeals is not only of great importance to the petitioner for the protection of its trade-mark rights, but is of

importance to all owners of trade-marks in which color is an essential element, *in connection with* other distinctive features, and which the elimination of color as was done in this case, would destroy.

Petitioner further respectfully submits that the Circuit Court of Appeals for the Fifth Circuit should obey and enforce the law as determined and announced in the decisions of this Honorable Court and other Federal Courts, to the end that owners of trade-marks, including petitioner, whose trade-marks have as an important element color, may be uniformly, justly and equitably dealt with, and the principles of trade-marks may be uniformly and equitably enforced throughout the Courts of the United States.

WHEREFORE, Your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said Circuit Court of Appeals to certify and send to this court on a day certain, to be therein designated, the entire transcript of the record in the case of Joseph Schlitz Brewing Company, Complainant and Appellant, vs. Houston Ice & Brewing Company, et al., Defendants and Appellees, No. 2990, November Term, 1916, including the proceedings thereon in the Circuit Court of Appeals, to the end that the said case may be reviewed and determined by this court as provided by law, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem proper and in conformity with law, and that said decree of the Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

And your petitioner will every pray, etc.,

JOSEPH SCHLITZ BREWING COMPANY,
RUSSELL JACKSON,
Counsel for Petitioner.

RUSSELL JACKSON,
Counsel for Petitioner.

STATE OF WISCONSIN, } ss.
MILWAUKEE COUNTY. }

J. W. McMillan, being duly sworn, deposes and says that he was counsel for the petitioner, Joseph Schlitz Brewing Company, and had personal charge for it of the case in the United States Circuit Court of Appeals for the Fifth Judicial Circuit referred to in the foregoing petition and that he had personal charge of the case in the District Court; that he has read the foregoing petition and knows the contents thereof and that the facts therein stated are true of his own knowledge; that he makes this verification for the petitioner for the reason that the said petitioner is a corporation and that the only facts involved in the said petition relate to the records, files and proceedings in said case which are all within the knowledge of the affiant.

Affiant further says that in his opinion the foregoing petition is well taken in point of law and ought to be granted.

J. W. McMILLAN.

Subscribed to and sworn to before me, this 27th day of December, 1917.

ARNOLD C. OTTO,
Notary Public, Milwaukee County, Wis.

CERTIFICATE OF COUNSEL.

I hereby certify that in my opinion the foregoing petition is well taken in point of law and ought to be granted.

RUSSELL JACKSON,
Counsel for Petitioner.

BRIEF ON BEHALF OF THE PETITIONER.

Petitioner files this application for a Writ of Certiorari because a majority of the Circuit Court of Appeals for the Fifth Circuit failed to conceive the trade-mark label of the petitioner as disclosed by the record in the case, and determined the rights of petitioner upon disassociated parts of the label never used by petitioner to distinguish its goods;

Because the majority of the Circuit Court of Appeals failed to follow the law applicable to trade-marks in which color, in definite association with other elements and characteristics, is the basis of trade-mark rights, and

Because such failure on the part of a majority of said court to conceive the facts and obey and enforce the law, in such cases has not only resulted in great injustice and inequity to the petitioner, but will result in great injustice and inequity to the owners of trade-marks in which color is a most important element.

GENERAL STATEMENT OF THE CASE.

This is a suit in equity and the Bill of Complaint charges the respondent with the infringement of the

registered trade-mark label of petitioner, originally registered in the office of the United States Commissioner of Patents in April, 1895, trade-mark No. 26,385, re-registered under the Act of Congress February 20th, 1905, on the 1st day of May, 1906, trade-mark No. 52,011 (Trans. p. 17, Exhibit "A," Trans. p. 27, Exhibit "B"), and of the infringement of the label adopted by petitioner in 1894 and since that time used by the petitioner in distinctive colors and arrangement of elements, to the exclusion of the world, except for the acts of the respondent, and also charges the respondent with unfair trade by the adoption and use of a label in color of background, style of lettering and color and arrangement of elements in such similitude to the color of background, style of letter-press and color and arrangement of elements upon the label of the petitioner; that goods of respondent were and would be passed and palmed off as and for goods of the petitioner to its great injury and damage.

The label of the petitioner adopted in 1894 and since used by it, is a parallelogram of light brown background, the name "Schlitz" appears in white, characteristic ornamental script, slanting upwards from left to right across the label, and underneath the white script lettering in white block lettering are the words, "The Beer That Made Milwaukee Famous." On the left hand side of the label is distinctly shown the picture of a globe in blue. Around the label near the outer edges is a white marginal line. The label is used in two sizes, the small size which is attached to twelve ounce or pint bottles, and a large size is attached to twenty-four ounce or quart bottles. The design, letter-press, color and arrangement of elements is alike upon both sizes.

The label of the respondent adopted in August, 1913,

is oblong in shape, approximately the size of the parallelogram used by petitioner for the large size label. The color of background is strikingly similar to the color of background previous to that time used only by petitioner, a light brown body color, and the label has a white marginal line around it near the outer edge, also upon petitioner's label. The name of respondent's product is written in ornamental script, slanting upwards from left to right across the label. The first letter of the name upon both the labels of the respondent and the petitioner is "S." This letter, distinctive upon petitioner's label, with its characteristic flourishes and shading, is copied upon respondent's infringing label. (Trans. pp. 17 and 27.) The name upon respondent's first label is finished with a distinctive paraph or shading almost identical with the paraph upon the petitioner's label. Both names, though different, are written in ornamental script, peculiar to the petitioner's label, slanting upwards from left to right, and the color of background and the color and slant of the lettering and the color and location of the circular figure are similar upon both labels.

Previous to the acts of respondent in adopting the brown body-colored label, the petitioner was the exclusive user, in the States of Louisiana and Texas and in Mexico, where the respondent was a competitor, as well as everywhere else in the world where petitioner's product was and is sold, of the brown body-colored label with white characteristic ornamental script lettering across the center, slanting upwards from left to right, white block lettering underneath and a blue circular figure on the left side of such label. Petitioner had continuously enjoyed the exclusive use of this brown body-

colored label in combination with the other elements described upon and in connection with the marketing of beer in brown bottles, in commerce between the states and with foreign countries, except for the interruptions by alleged infringers mentioned by petitioner's witnesses at the hearing of the suit, all of whom had been notified to refrain, and had refrained, from the use of such imitative label or were compelled to desist from such alleged infringement by appropriate court action, leaving petitioner in exclusive enjoyment of its brown trade-mark label at the time of the infringement by the respondent herein complained of.

On the hearing petitioner alleged and proved specific instances of confusion that had resulted from the adoption by the respondent of the brown body-colored label, and that beer of the respondent had been passed and palmed off as and for beer of the petitioner; that unscrupulous dealers had been induced by the similarity between the two labels to pass and palm off the product of the respondent for the product of petitioner; that experienced retailers of beer had confused the two labels because of their similarity, and because by long-continued use they associated the brown bottle and brown label with petitioner's product. Petitioner also alleged and proved that agents of respondent had endeavored to induce unscrupulous dealers to purchase beer of the respondent to re-sell as and for beer of the petitioner, by reason of the similarity of the dress of the beer of the respondent, but the officers of respondent disclaimed either authority or responsibility for such acts of unfair trade.

Respondent answered that the labels of petitioner and respondent were distinguishable in the wording

thereon, and the difference in size between the small label of petitioner and label of respondent which was used upon both twelve ounce or pint bottles, and twenty-four ounce or quart size bottles. The respondent disclaimed intention to defraud petitioner, but voluntarily changed the characteristic "S" (which was almost an exact copy of the "S" upon petitioner's label), upon the first label adopted by respondents to an "S" of different design, shown on Exhibit "J," on page 31 of the Transcript, and changed the design of the paraph or shading underneath the lettering to a flourish somewhat less a copy of the paraph upon the petitioner's label.

Before the cause came for trial it appears the respondent again voluntarily changed the label a third time and at the time of the trial was using a design shown on page 209 of the printed Transcript.

The petitioner attached to ninety per cent of the beer bottled by it, the distinctive labels, Exhibits "A" and "B," pages 17 and 27 of the Transcript.

Respondent admitted that petitioner had extensive trade in Texas, the market supplied by the respondent. During the six years preceding the filing of the complaint petitioner had sold in the State of Texas fifty million bottles of beer labeled with its light brown body-colored label.

Between 1902 and 1912 the respondent had been a jobber of the petitioner's beer at the same time manufacturing its Southern Select beer which was put up in clear glass bottles and sold with a white label, Exhibit "D" on page 208 of the Transcript. Respondent was responsible for the sale of 817 car-load and half car-load shipments of beer in bottles from the petitioner's brewery to points in Louisiana and Texas, all of which

bottles were labeled with petitioner's light brown body-colored label.

The petitioner markets its product throughout the world. Ninety per cent of its beer put up in bottles is marketed in brown bottles labeled with the brown body-colored label, upon which are the other characteristics in color. It has registered its label in every country in the world to which its product is sent. At the time of the filing of this complaint it sold its product in the Republic of Mexico, a market where respondent also had some trade and was in competition with petitioner. It sold and now sells its product in Cuba, a market tributary to Houston, Texas, where it comes into direct competition with respondent, and moreover the respondent had been a jobber of its product and knew its distinctive mark for many years.

CONFUSION OF CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals failed to conceive the trade-mark which was the subject of the suit and the badge of identification of the petitioner's product will be evident upon a brief resume of the case disclosed by the Transcript.

In the Bill of Complaint petitioner described in detail the trade-mark label which was the badge of identification of its product, and made particular reference to the color of the respective elements described as well as their arrangement. (Trans. pp. 4 and 5.)

The label in colors was attached to the Bill of Complaint, Exhibit "A," Trans. p. 17, being the large size label, and the small sized label on a pint bottle was filed with the complaint, Exhibit "D."

It was not controverted that petitioner was the first to use a solid body-color other than white upon a beer label, and that petitioner had used the brown body-colored label upon its brand of beer most commonly sold in commerce between the states and with foreign countries since 1894. (Trans. p. 57.)

On pp. 59, et seq., of the Transcript testimony is given by the manager of the bottling department of petitioner of a number of instances where the question as to petitioner's right to use the brown label was in issue, and Mr. Bielfeld testifies that in every instance where such alleged infringements came to the knowledge of the petitioner, steps were taken to stop the use by a competitor of a brown label upon beer in brown bottles in similitude to petitioner's trade-mark label.

Petitioner's witnesses testified to numerous instances in which the advertising of petitioner bore a fac-simile *in colors* of petitioner's label. (Trans. p. 66.)

Of the three hundred and fifty million bottles of beer disposed of by the petitioner in the six years prior to the filing of the suit, eighty per cent were put up in brown bottles and labeled with petitioner's brown label, the subject of this suit. Of the fifty million bottles disposed of in the State of Texas in those same six years practically all were of this brand, and bore the brown label.

There is not one syllable of testimony in the entire record that any other distributor or manufacturer of beer used a brown label of any kind, and it is fair to assume counsel for respondent would have found evidence of the use of other brown labels if such proof was available. The secretary of respondent company testified that about twelve days before the trial he wrote to every brewery in the United States as published in Toby's

Directory, to send him their labels, and he finds in such labels elements of petitioner's label reproduced, but does not claim the brown body-color as one of the elements found. (Trans. p. 173.)

The court in its opinion reported in 241 Fed. 817, at p. 819, finds:

> "The plaintiff had for twenty years or more distributed its bottled beer in brown bottles with a brown label." * * *
>
> "The alleged infringement and unfair competition was based on the use by the defendant of a label on its bottles, claimed to have resembled plaintiff's label so closely as to mislead purchasers into the belief that they were buying plaintiff's product, when they were in fact buying that of the defendants."

The court continued:

> "The dress of defendant's bottled beer which gives rise to the complaint of the plaintiff, consisted in its having been put up in brown bottles with a brown label, charged to have been imitative of that of the plaintiff." (P. 820.)

In another place in the opinion the court says:

> "Its (petitioner's) exact contention is that the dress of its bottled product in brown bottles with brown labels, *in combination with certain other elements* in the label peculiar to it, is entitled to protection, and that the defendants by their use of a brown bottle with a brown label with certain imitative characteristics, has violated its rights." (P. 820.)

Again on page 821.

> "A brown bottle with a brown label indicates to many the beer of the plaintiff. If they examined no further than the color of the bottle and the color of the label, the deception as to the origin of the beer would be complete." * * *

So far the court has stuck to the record and the issues in the case, but when the court says:

> "The plaintiff does not contend that * * * it has acquired the exclusive right to use either brown labels in bottling its beer" (P. 820),

or that,

> "Plaintiff's counsel concedes that neither the brown bottle, nor the brown label, nor both in combination apart from other points of resemblance, would establish infringement or unfair competition,"

it indulges in *obiter dicta*, for no question was presented in this case as to petitioner's right to the brown label aside from other points of resemblance, for the respondent had imitated not only the color of background, but had imitated the style of lettering, the arrangement of elements and the coloring of each upon a label slightly different in size and shape, and with different wording thereon. The color of background, the slant of the lettering and its position upon the label, the style of lettering and its color, and the color and position of the blue figure were all imitated.

There is not a syllable of testimony in the record to support the assertion that all breweries had the right to use the brown bottle with brown labels. (Opinion, p. 821.) Nothing in the record discloses a case like

> *Coats vs. Merrick Thread Co.*, 149 U. S. 562-573,

quoted from in the opinion. In that case the record disclosed that thread manufacturers had used black and gold labels for fifty years. In this case the record discloses no instance of any other brewer using brown

labels upon brown bottles, except such as were stopped by petitioner.

If, as the court says, the brown label indicates to many the beer of the petitioner and no other brewer has used a brown label for the twenty years that petitioner has used that mark, then it had acquired a secondary meaning which the respondent was bound to respect and the court should have granted the petitioner the relief prayed for.

RULE AS TO COLOR.

Petitioner's counsel on the hearing of this case in the District Court and upon the argument in the Circuit Court of Appeals endeavored to enlighten the courts as to the exact position of the petitioner regarding the color of its label.

The theory of the petitioner's entire case from the commencement of the suit has been that by reason of the exclusive use of the particular trade-mark label with a brown body-color upon brown bottles containing beer, for upwards of twenty years, the petitioner is entitled to the protection of the color of said label in combination or association with the other characteristics that go to make up the badge of identification of petitioner's product.

Counsel for the respondent charged that petitioner was asking for a monopoly of the color brown, to which petitioner's counsel answered that petitioner made no such claim to the color brown in and of itself, but did claim, and the record disclosed that the petitioner claimed, the brown colored label *in combination with the other elements which go to make up its trade-mark label.*

The rule for which counsel has uniformly contended is better stated than counsel can state it by Mr. Justice Holmes in the case of

New England N. E. Awl Co. vs. Marlborough, 168 Mass. 154, cited by the Circuit Court of Appeals on page 821 of its reported opinion,

> "Of course a person cannot claim the monopoly of a color in connection with a particular line of trade, and very likely not in connection with the labels of a certain kind of goods generally. *But the most universal element may be appropriated as a specific mark of a plaintiff's goods, if it is used and claimed only in connection with a sufficiently complex combination of other things.* The plaintiff did not claim the exclusive right to brown labels for awls, but it claimed the exclusive *use of the brown color in combination,* which we have described."

The case under consideration is just that. The petitioner claims the brown label in combination with the other elements heretofore described, and particularly set forth in the complaint and uniformly alluded to in the testimony.

When the Circuit Court of Appeals eliminates the brown color from the label it bases its decision upon elements, which, aside from the color, have never been used by the petitioner to identify its goods.

As counsel for the petitioner understood the rule regarding color, it would have been unavailing for petitioner to have claimed an exclusive right to a particular color except the color "be impressed in a particular design as a circle, square, triangle, a cross or a star," citing:

Leschen Rope Co. vs. Broderick, 201 U. S. 166, p. 171, or as Mr. Justice Lurton says in

Newcomer vs. Scriven, 168 Fed. at p. 623.

> "Color, except in connection with some definite, arbitrary design such as when impressed upon a circle, star, cross or other figure, or employed in definite association with some characteristics which serve to distinguish the article as made or sold by a particular person, is not the subject of monopoly as a trade-mark."

We endeavored to point out to both the District Court and the Circuit Court of Appeals that respondent had imitated not only the color of background, but the style of lettering, the arrangement of the elements and the color of each as they had appeared upon the petitioner's label *in combination.*

Petitioner submits that the disclaimer of a monopoly of the color brown in and of itself is consistent with the further claim that this element to which it may not have the exclusive right in and of itself may still be the most important element in petitioner's label combination, and when the Circuit Court of Appeals eliminates that most important element from the combination claimed by the petitioner, it has decided the case upon a combination not claimed by the petitioner, never used by it, and not disclosed in the record except in combination with the particular color which is its most essential feature.

If a patent combination or a combination of elements in a trade-mark can be dissected so as to eliminate a most important element in the combination, then long-established rights based upon such combination, however exclusive, are insecure.

We are constrained to believe that the Circuit Court of Appeals failed to appreciate that trade-mark rights may be asserted to a combination of elements, notwithstanding a most important element thereof may not be the subject of exclusive appropriation, and this is quite evident from the citations and quotations from cases relied upon by the Circuit Court of Appeals to support its conclusion, whereas the cases cited expressly support the position of the petitioner as to its established rights to use upon a brown bottle containing beer a brown label in combination with the other elements which go to make up petitioner's distinctive mark.

The Circuit Court of Appeals' decision is in direct conflict with every important adjudication upon trade-mark rights arising from the use of a trade-mark having a number of elements, of which color is one of the principal elements.

Upon the argument before the Circuit Court of Appeals a large part of the brief was devoted to a discussion of the law as to color. In the course of the argument counsel for the petitioner asserted that after twenty years exclusive user, the petitioner's product was known as "the brown label beer."

No other manufacturer of beer in bottles had ever used a brown label in similitude to petitioner's label upon beer in brown bottles with the acquiescence or consent of the petitioner or its officers.

In at least one instance, Exhibit "G," the only points of similarity were the brown label with white lettering, Peterson's standard beer in similitude of the petitioner's label, and the use of the label objected to had been discontinued. Petitioner did not rely solely upon the shape

or size of its label, but particularly objected to infringements by the simulation of the color of background, color and style of letter-press and color of figure on the left hand side, that is, any combination which in general appearance suggested the exclusive brown label of the petitioner with its white letter-press and blue figure thereon.

If the Circuit Court of Appeals had followed the decisions in this situation and adjudicated the trade-mark of the petitioner, adopted in 1894 and continuously thereafter used in commerce between the several states and in foreign countries, it could have come to but one conclusion, that the petitioner was entitled to protection of its trade-mark, the color of which was its most essential element.

In support of this conclusion we respectfully direct the court's attention to the following cases:

This Honorable Court, speaking through Mr. Justice Clifford, says in

McLean vs. Fleming, 96 U. S. 245, p. 255.

> "Mention may also be made of the fact that the color of the label and the wax impression on top of the box are well suited to divert the attention of the unsuspecting buyer from any critical examination of the prepared article."

At p. 256 the court says:

> "Difference between those exhibits and Exhibits 'F' and 'H' of the complainant undoubtedly exist; and still it is manifest that the general appearance of the package in the respects mentioned, and others which might be suggested, is well calculated to mislead and deceive the unwary and all others who purchase the article without opening the box and examining the label."

We direct the court's attention to the language of Mr. Justice Holmes in New England Awl Company case, quoted in the report of this case, 241 Fed. Rep. at page 821, and previously here referred to.

In *Anheuser-Busch Brewing Association vs. Clark*, 26 Fed. 410, complainant was the first to use for bottled beer a label with a diagonal red band extending *downward* from left to right, with the name of the kind of beer appearing in white letters upon such band and the defendant used a label which consisted in part of a diagonal red band extending *upward* from left to right with the kind of beer also appearing in white letters upon the band, an injunction was granted though the labels were otherwise strikingly dissimilar.

In *G. Heileman Brewing Co. vs. Independent Brewing Co.*, 191 Fed. 489, the imitation of a conventional design in general color and arrangement of elements was enjoined.

And in *Kostering vs. Seattle Brewing Co.*, 116 Fed. 620, the court awarded an injunction upon the general appearance and dress of the package and the court says:

> "Many consumers of beer are unable to read and many are foreigners and unacquainted with the English language. All consumers, whether able to read or not, are guided by the general appearance of the package or label which is before them."

Other cases upon which the petitioner relied, and to which it cited the Circuit Court of Appeals, are,

The case of *Fairbanks vs. Bell*, 77 Fed. 869, 23 C. C. A. 554. The picture of the package appears on page 559 of the C. C. A. reports. The court held that notwithstanding distinctive features where the yellow color

of the complainant's package was copied by the defendant, there was a manifest intent to simulate complainant's packages and an injunction should issue. The court in that case has this to say about color:

> "Color, undoubtedly, is a most important element in all package combinations; but there are other elements as well which go to make up the entire combination. * * * It would not be giving the complainant a monopoly of yellow to restrain the sale of a particular yellow package, where, in addition to the color, a number of other elements each differing more or less from its analogue in complainant's package had been so collocated together as to produce a general appearance calculated to delude the unwary purchaser." 77 Fed. p. 876.

This is precisely what the respondent did in the present case and this was the contention of the petitioner's counsel on the argument of this case, and the theory upon which the case was tried from the commencement of the suit.

Stuart vs. Stewart, 91 Fed. 243; 33 C. C. A. 481.

In that case the rectangular, oblong box in which pills were sold was of a light blue color and the court enjoined the defendant from using his name which was *idem sonams,* on a box of *indigo* blue color.

In *Ohio Baking Co. vs. National Biscuit Co.,* 127 Fed. p. 116, and in *National Biscuit Co. vs. Swick,* 121 Fed. 1007, the trade-marks, shown in reports, were quite dissimilar, but printed upon bright red background, and the use of the mark was enjoined, on account of the color.

In *Gulden vs. Chance,* 182 Fed. 303, the labels printed in colors opposite page 303 in the report, the colors and shape of labels are similar, but the details of printed

matter upon them are different, but the court awarded complainant relief, and so in the case of *Wrigley vs. Grove Company,* 183 Fed. 99, the court awarded complainant relief where the color scheme of plaintiff's gum box was imitated, although the details of the labels were quite different.

CONCLUSION.

We deem it unnecessary to continue the citation of authority to this Honorable Court. We are unable to find any authority upon which the majority of the Circuit Court of Appeals can justify the dismemberment of petitioner's trade-mark.

We respectfully submit that petitioner made no claim in this suit except upon the trade-mark as used in distinctive color and arrangement of elements in combination.

That the Circuit Court of Appeals failed to follow the adjudicated cases as to the protection of trade-marks in colors.

We respectfully submit that petitioner is entitled to a Writ of Certiorari compelling the Circuit Court of Appeals for the Fifth Circuit to transmit to this Honorable Court the record in this case to the end that the petitioner may be afforded the relief upon the subject matter disclosed by the record in the case, and not upon a device which petitioner never claimed nor used.

Petitioner respectfully submits that it was the duty of the Circuit Court of Appeals upon the undisputed allegations in the petitioner's Bill of Complaint and the uncontroverted facts adduced upon the hearing of the case, to award the petitioner the relief prayed for under

the uniform decisions of this Honorable Court, and of the leading Circuit Courts of Appeals conversant with the adjudication of trademark rights.

The petitioner does not ask this Honorable Court to review an exercise of judicial discretion nor a finding upon conflicting evidence, but submits that the subject matter of the suit, the theory of the petitioner's case from the commencement of this suit, the undisputed facts disclosed in the record establish a consistent claim by petitioner to its brown label and other elements in the colors heretofore described, used upon beer in brown bottles, and the Circuit Court of Appeals was in duty bound to award the petitioner the relief prayed for under the law and decisions.

The respondent, having knowledge of the petitioner's exclusive rights while acting as a jobber of petitioner's product and in general as a competitor in the same field for nearly twenty years, owed a duty to petitioner when it put up its beer in brown bottles to so distinguish its product by a distinguishing label that confusion would not result, and petitioner should have an injunction enjoining respondent from using upon and in connection with the sale of beer in brown bottles, a brown label in similitude to the petitioner's brown label.

Respectfully submitted,

RUSSELL JACKSON,
Counsel for the Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 326.

JOSEPH SCHLITZ BREWING COMPANY,

Complainant and Petitioner,

vs.

HOUSTON ICE & BREWING COMPANY, H. HAMILTON, R. L. AUTREY, JAMES H. STUDDART, JESSE ANDREWS, JOSEPH F. MEYERS, B. A. REISNER and D. ROSSI, as Trustees of the Houston Ice & Brewing Association, under a declaration of trust dated October 20, 1914, and otherwise as successors and assigns of the said Houston Ice & Brewing Company,

Defendants and Respondents.

Brief and Argument for the Petitioner.

STATEMENT OF CASE.

This cause comes to this court upon a writ of certiorari to the Circuit Court of Appeals, Fifth Circuit, granted March 16, 1918.

The appeal to the Circuit Court of Appeals was from a final decree dismissing the bill of complaint herein, entered in the District Court of the Southern District of Texas on the 11th day of April, 1916. The opinion is reported in 241 Federal 817.

The complaint was filed March 20, 1914. The facts and evidence adduced upon final hearing in March, 1915, are as follows:

The petitioner's predecessor, Joseph Schlitz, commenced the brewing of beer in Milwaukee in 1848. In 1874 the business which had developed extensively was incorporated in the state of Wisconsin under the name of Joseph Schlitz Brewing Com-

pany, and the product of the petitioner became an article of commerce in all of the states of the United States where beer was permitted to be sold and in foreign countries.

The defendant, Houston Ice & Brewing Company, for a number of years was the agent of the petitioner in the state of Texas and made sales in Louisiana. It also is a brewer of beer and markets its products in the states of Texas, Louisiana and in Mexico and other localities tributary to the city of Houston and the state of Texas.

The petitioner, Joseph Schlitz Brewing Company, marketed a part of its product in bottles which were filled and sealed at the brewery. During the six years prior to the commencement of this cause, in 1913, the petitioner marketed of this product three hundred fifty million (350,000,000) bottles which were distributed over the United States and foreign countries. (Trans. p. 42.) Outside of English speaking countries it shipped beer to Central and South America, Japan, China, India, Italy, Costa Rica, Cuba, Ecuador, Honduras, Spanish Honduras, Nicaragua, Mexico, Panama, Porto Rico and San Domingo; and fifty million (50,000,000) bottles or one-seventh of the entire product sold in bottles was sold in the state of Texas, the territory tributary to the city of Houston, where the respondent was located. Between 1900 and 1912 the respondent sold and caused to be sold eight hundred seventeen (817) carload and half carload shipments, which would be approximately twelve million (12,000,000) small size bottles of the petitioner's product. All the beer shipped on account of the Houston Ice & Brewing Company was bottled in dark brown bottles and labeled with the light brown body colored export label of the petitioner. (Trans. pp. 47, 48, 132.)

In 1893 the petitioner desired to more distinctively label its product and thereupon caused inquiries to be sent to numerous breweries and about forty lithographing companies, and accumulated twenty-two or twenty-three hundred labels of different kinds, and adopted a label, the general outline of which

is shown on page 119 of the transcript of record, trademark No. 26385. (Trans. p. 40, 119.)

Pursuant to the statutes of the United States as amended by an act of Congress approved on the 20th day of February, 1905, application for a new registration of the label, under the law as amended, was made, and was allowed on the 1st day of May, 1906. The certificate is numbered 52011. (See copy Trans. p. 120.) Pursuant to subsequent amendments of the Federal Trademark Law and amendments of foreign laws and treaties, the general trademark, the "Belted Globe," as well as the label were re-registered in the United States Patent Office on March 4, 1913, and July 16, 1912, respectively. (Copy Trans. 118; Copy Trans. p. 138.)

BODY COLOR AN ELEMENT.

The most striking result of the investigation just referred to was this: *Not one label was found which did not have the natural color of the paper, that is white, as a body color, and the letterpress marks and other indicia in other* colors or black. (Trans. pp. 50, 51, 82.)

The Joseph Schlitz Brewing Company was at this time bottling three different brands or grades of beer, viz., "Export," which was especially brewed and bottled for interstate and foreign trade; "Dark," a beer made from caramalized malt, resembling the "Bavarian" or "Munich" beers in taste and color; and "Pale," a beer of very light color and small alcoholic content, resembling the "Bohemian" or "Budweiser" beers. The last named brands were put out to meet a demand in territory lying contiguous to Milwaukee, and neither was intended or manufactured for export trade.

These labels were adopted not because the body colors of the labels harmonized with the color of the bottles which contained the beer, but with the view of distinguishing Schlitz

labels from those of other breweries, all of which had white as a body color; and also to indicate the color of the beer which the bottle contained. (Trans. p. 51.)

The solid body color of these labels was such an innovation and was so strikingly different from the body color of the other beer labels that they were called "bay rum labels" by the trade, because a popular bottled bay rum was then being marketed bearing a label with a body color other than white. (Trans. p. 41.)

From 1894 to 1912 ninety per cent (90%) of the bottled beer marketed by the Joseph Schlitz Brewing Company has been the so-called "Export" beer (Trans. p 41), which bore the export label, the light brown body colored label with white letterpress, blue figure at the left, and distinctive arrangement shown on the trade mark label, and this label was attached to all beer sold by the respondent for the petitioner between the years 1900 and 1912.

Beginning with April, 1911, all Schlitz beer bottled at the brewery was put up in brown bottles. (Trans. p. 42.)

ADVERTISING AND PUBLICITY.

After the adoption of the brown body label the Brewing Company launched an extensive campaign of advertising its beer bottled in brown bottles, bearing a brown label with letterpress in white. During the years 1900 to 1912, both inclusive, Two Million One Hundred Thousand Dollars ($2,100,000.00) were expended for various advertising mediums (Trans. pp. 45-47), ninety per cent (90%) of which, however, referred directly to the brown label of which "Exhibit D" is a copy. (Trans. p. 54.) Practically all of these advertising media, with the exception of advertisements appearing in newspapers, and magazines of general circulation, showed either the labels in fac simile colors, or pictures of a brown bottle bearing the label

in fac simile colors. (Y-1 to Y-8, both inclusive, are samples of signs and lithographic advertising matter which were in use during the years 1902 to 1911 and of which upwards of eighty thousand (80,000) were distributed throughout the United States and other countries, "Exhibits BB" to "BB3," both inclusive, are copies of magazine advertisements, and "CC" to "CC4," both inclusive, are copies of newspaper advertisements which appeared generally throughout the country in the years 1906 to 1912. "Exhibit F" shows the amount of advertising done in the newspapers in the state of Texas. "Exhibit Q" is a record of the billboard advertising in fac simile colors done in the state of Texas.)

During the years 1904 to 1912 the brewery furnished its agents and customers with letterheads, billheads, envelopes and other stationery of various sizes, of which "Exhibits S and X" (Trans. pp. 129-130) are samples, exceeding eighty million (80,000,000) in number All of this stationery bore a fac simile copy, in miniature, of the brown body colored label.

RESPONDENT'S INFRINGMENT AND UNFAIR TRADE.

Soon after respondent ceased to be the agent of petitioner, and in the summer of 1913, it adopted and used a brown label upon beer put up in brown bottles, which label was in such striking similitude to the petitioner's label exclusively used for nearly twenty years, that petitioner notified respondent to stop the use of the label. (Trans. p. 22.)

The first infringing label and the one upon the use of which the suit was started was similar to the label of petitioner in the following particulars:

It was used upon a brown bottle, the color of bottle then uniformly used by petitioner.

It has a light brown body color, the color adopted by peti-

tioner in 1894 and since used by it in the marketing of its "Export" beer, the brand sold in Texas and other territory supplied by respondent, and the color used on all of the beer sold by respondent for petitioner while its agent in that locality.

It had white characteristic script, and block lettering and a white marginal line, in relatively the same location as these elements are found upon petitioner's label.

Respondent had changed the color of the annular ring from red to blue in similitude to the blue color of the globe on petitioner's label.

The size of the respondent's label was uniform and larger than the label used by petitioner upon small bottles. Comparison may be made, however, by reference to the plaintiff's physical "Exhibits B" and "D," small bottles with petitioner's and respondent's labels thereon, respectively, filed with the complaint and transmitted to this court.

Respondent's attorneys disclaimed any intention on the part of the respondent to infringe petitioner's label, and offered to change the label to the one disclosed on "Exhibit J" to the answer (Trans. p. 23), the respondent's label. In this label there was a change in the distinctive "S" and paraph similar to petitioner's exclusive design, but the coloring and arrangement of the principal features remained the same.

In June, 1914, the respondent was still using the original infringing label, "Exhibit C" to the complaint, but offered when the answer was filed at that time to use "Exhibit J" when the supply of one million (1,000,000) "Exhibit C" labels aforesaid was exhausted, although on May 21, 1914, it asserted in the patent office the exclusive right to use the particular style of lettering shown in "Exhibit C" upon a trade mark application, and asserted that no other person had a right to use a mark in resemblance thereto upon sworn declaration of its right to that letterpress in November, 1914. (Trans. p. 140.)

Notwithstanding the above claims to the style of lettering in similitude to the petitioner's, the respondents, prior to the trial

of the cause in District Court, had again changed the label used by it to one disclosed in "Exhibit L." (Trans. p. 146.) This third label had the general appearance of the former labels, but two details of the letterpress, the characteristic "S" and the paraph, were again somewhat modified.

The last label was not directly in issue, but Mr. Autrey, on the hearing in District Court, testified it was the label they were using in March, 1915; that they changed the "S" again from the one used in "Exhibit J" because that was more ungainly and inartistic. (Trans. p. 109.)

In August, 1913, a carload of respondents' bottled beer, put up in the new "dress," the brown label, was sent to a dealer at Bryan, Texas. Clarence Selvage, a representative of John T. Barbee Company, wholesale and retail liquor dealers of Louisville, Kentucky, was at the time visiting this dealer at Bryan, in his capacity as a traveling salesman, and, on the arrival of the carload of respondent's beer, was misled into the belief that the respondent's product put up in the brown glass bottle with the light brown label with white script lettering was in fact "Schlitz" beer. (Trans. p. 60.)

About the same time Louis Anderson, proprietor of the Brazos Hotel at Houston, Texas, in which a bar is operated, was similarly confused. At the bar of the Brazos Hotel respondent's beer was carried only in clear glass bottles bearing white labels. The only beer sold at this bar in brown bottles bearing a brown label was "Schlitz Export." (Trans. p. 79.)

Anderson was at a bar other than at his own when he first saw the new package of the Houston Ice & Brewing Company. He had called for "Southern Select." He was served with a bottle of "Southern Select" put up in a brown bottle bearing a brown label with ornamental script in white. His testimony relating to the incident, appears on page 79 of the transcript:

> "I was served with a bottle of beer and I thought it was 'Schlitz.' I called the bartender's attention to it, and he said, 'that is Southern Select,' and then I examined it. I said 'you made a mistake. You served me Schlitz beer and

I ordered Select.' I then read the label and saw it was 'Select.' I had to read the label in order to tell the difference."

Selvage was in the habit of stopping at the Brazos Hotel of which Anderson was the proprietor.

Selvage's conversation with Autrey, the secretary of the respondent, in the bar-room of the Brazos Hotel, is given on page 69 of the transcript (Trans. p. 69). Among other things he says:

"I told him I thought it was the cleverest imitation I ever saw * * * * * when Schlitz gets hold of you * * * * * he will not prosecute you for imitation, he will prosecute you for counterfeit." (Trans. p. 69.)

It is undisputed, although the respondents deny any responsibility for the acts of their agents and representatives, that dealers in the petitioner's product were visited by agents and representatives of the Houston Ice & Brewing Company soon after it had adopted the brown bottle with the brown label, soliciting orders and suggesting the brown label as the inducement.

On one occasion the agent told petitioner's dealer that the Houston Ice & Brewing Company was putting up beer in brown bottles, with a brown label, similar to the Schlitz label, and that he could handle it right along with Schlitz. (Trans. p. 80.) On another that he could sell beer of the respondent's in brown bottles with the brown label for Schlitz and make more money by selling it. (Trans. p. 58.)

At another time a dealer was told he could sell "Southern Select" in brown bottles with the brown label for Schlitz, and the dealer admits that he did sell it for Schlitz to men who could not read. (Trans. p. 88.) And on still another occasion the dealer was told that there is no use selling Schlitz, "you can sell 'Southern Select' for the same purpose—the label and everything is alike." (Trans. p. 76.)

The most naive explanation of the circumstance related by the witness *Tomlinson* (Trans. p. 80), is furnished by one Craeger, who is an agent of respondent. The court examined this witness concerning his visit to petitioner's witness, Tomlinson, a storekeeper at Stafford, Texas. (Trans. p. 106.) Craeger said:

> "I know a man engaged in the saloon business at Stafford by the name of Tomlinson. I think maybe three years ago I sold him one or two casks of beer, that was all * * *. The last time I called while (I was) standing there (telephoning) they were unloading Schlitz beer and that was called to my attention, and I told him I had a better beer in a black bottle *with a brown label,* and he told me what Schlitz cost him and I told him I had as good or better than Schlitz. Sold for less money."
>
> *Court:* Why did you say that your beer was put up in brown bottles with a brown label?
>
> *A.* Well, Schlitz was put up in a brown bottle with a brown label."

EVIDENCE OF CONFUSION.

Petitioner will not further extend this Statement of Facts, but merely cites the numerous instances disclosed by the record in which bartenders and others used to handling beer in bottles were confused and made mistakes because of the striking similarity between the petitioner's and respondent's packages (Trans. 59, 61, 73, 75, 81, 104), and to the instances of actual palming off of defendant's goods as and for the goods of the petitioner, related on Trans. pp. 64, 69, 70, 76, 77, 86, 88 and 91.

The hearing of the cause before the District Court was concluded in April, 1915. April 11, 1916, a decree was entered dismissing the complaint, but no findings were made by the court and no opinion filed. Petitioner appealed to the Circuit Court of Appeals. The case was argued before that court February 27, 1917, and on April 28, 1917, the Circuit Court of Appeals filed its opinion affirming the judgment of the District Court. Because of what petitioner's counsel conceived to be an erroneous application of the rule as to trademark rights when color

is an essential element, petitioner filed a motion for rehearing.

On October 4, 1917, an order denying the motion for rehearing was filed and on December 31, 1917, a petition for a writ of certiorari was presented to this court and granted, and certiorari and return filed April 25, 1918.

CIRCUIT COURT OF APPEALS' DECISION.

Assignments of Error.

On the appeal of this cause to the Circuit Court of Appeals petitioner filed an assignment of errors. (Trans. pp. 150 to 160, both inclusive.)

Under the assignments numbered I., II., IV., VII. and IX., the facts set forth in the Bill of Complaint and proved upon the hearing of the cause, as now stated herein, should have entitled petitioner to the relief prayed for.

Many of these facts are summarized by the Circuit Court of Appeals in its opinion so that we may refer directly to the Statement of Facts disclosed by the opinion of the Circuit Court of Appeals indicating only such statements as are contrary to the admitted statements in the record.

> "The plaintiff's brewery and shipping point is in the city of Milwaukee and that of the defendant in Houston, Texas. Both plaintiff and defendant are engaged in selling bottled beer throughout the state of Texas and are in direct competition with each other. The plaintiff had for twenty years or more distributed its beer in brown bottles with brown labels. The defendant originally employed only white bottles with white labels, but for several years had used also the brown bottles in connection with the brown labels." (Trans. p. 179.)

To this statement may be added the statement of Mr. Bielfeld that petitioner jealously guarded its property right in this particular body colored label with its white letterpress and

blue figure thereon, and whenever any labels considered imitations were brought to its attention, steps were taken to stop the use of them.

> "The defendants had at one time been the distributing agents for the plaintiff's bottled beer in the state of Texas, but had ceased to be connected with the plaintiff for some time before suit was filed."

The exact date when the last shipment was made for the defendant by the petitioner was established by Mr. Bielfeld as June, 1912. (Trans. p. 48.) The defendant and respondent received the first bill for one million (1,000,000) labels, the original label indicated as "Exhibit C" on page 13 of the transcript, in September, 1913. The first evidence of the use of the brown label by the respondent was shortly before that date.

> "There was evidence as to cases of confusion and evidence tending to show intentional deception on the part of the soliciting agents of the defendants in the sale of their product, but the defendant denied authorization of any deception by their agents."

It is true, the petitioner did not discourage the resale of its bottles in Texas, and the precise question presented to the court was as indicated in the opinion:

> "The alleged infringement and unfair competition was based on the use by the defendants of a label on the bottles claimed to have resembled plaintiff's label so closely as to mislead purchasers to buy the product of the plaintiff when in fact they were buying that of the defendants * * *. Its exact contention is that the 'dress' of its bottled product in brown bottles with brown labels in *combination with certain other elements in the label peculiar to it*, is entitled to protection, and that the defendants by the use of a brown bottle with brown label and with certain imitative characteristics has violated its rights."

Although there is no evidence in the record that any other manufacturer used a brown label upon brown bottles, because of an alleged disclaimer of petitioner of the right to use the

color brown in and of itself as a trademark, the court restates the question thus:

> "The question, therefore, is whether the two labels are so alike in respects other than their own color and that of the containers, as to make it likely that, because of such other points of resemblance, the product of the defendant might be mistaken by purchasers for that of the plaintiff in the ordinary course of retailing beer. The determinative facts are, therefore, the points of resemblance and dissimilarity, in respects other than their general color, of the two labels, and their probable effect upon consuming purchasers of the beer." (Trans. p. 180.)

This conclusion is based on a misunderstanding of the duty of the defendant when it commenced to supply beer to the public in brown bottles with a brown label, in a field where brown bottles with the brown label were previously exclusively used by the petitioner, to so distinguish its goods that purchasers of petitioner's product would not be deceived by the general appearance of respondent's label, into the belief that they were purchasing petitioner's beer.

The court says: "A brown bottle with a brown label indicates to many the beer of the plaintiff."

The other assignments of error were not specially urged either on the original hearing or on the appeal. Petitioner confined its argument to the one proposition.

Did the respondent by the adoption of the label "Exhibit C" to the Bill of Complaint (Trans. p. 13), or the subsequent modifications of it retaining the color and general arrangement of elements, invade petitioner's property rights in the good will of its business or infringe the trademark label and dress of package which petitioner had adopted and exclusively used to extend and maintain that good will?

BRIEF OF ARGUMENT.

I.

BASIS OF REMEDY.

Relief against the infringement of a trademark, whether at common law or under the statutes, and against unfair competition, is afforded on the ground that the petitioner's property right in the good will of the business has been unlawfully invaded.

The true basis for affording a trader the private remedy rests in his property right in the good will of his business and in the marks, "dress" and other indicia employed to maintain and extend it. Any other basis is unsound and leads to illogical conclusions.

Hanover Milling Co. vs. Metcalf, 240 U. S. 403 (and cases therein cited).

Borden vs. Borden, 201 Fed. 510.

Kentucky etc. Co. vs. Wathen, 110 Fed. 641, 645 (and cases cited).

Fox vs. Glynn, 191 Mass. 344, 350.

American etc. Co. vs. Saginaw etc. Co., 103 Fed. 281; 50 L. R. A. 609.

Heilman Brg. Co. vs. Independent Brg. Co., 191 Fed. 489.

Grocers Supply Co. vs. Depuis, 219 Mass. 576; 107 N. E. 389.

Garret vs. Garret, 78 Fed. 472, 24 C. C. A. 173.

(a) *Good Will,* in general.

The good will of a business is a property right. It rests largely in the continued patronage of its customers and in the trademark, "dress" and other indicia employed to suggest the

origin of the goods to such customers as the business attracts. It makes no difference whether these customers are Texans or Mexicans; whether they are Cubans or Louisianans. It makes no difference whether these customers are wary or unwary; whether they are careful or careless; whether they are literate or illiterate; whether they stop to reflect or act upon the instant; or whether they read labels or do not read labels.

Brooklyn White Lead Co. vs. Masury, 25 Barb. 416.
Gulden vs. Chance, 182 Fed. 303.
Florence Mfg. Co. vs. Dowd, 178 Fed. 73, 75.
Rogers Mfg. Co. vs. Simpson, 54 Conn. 545.
Pillsburg vs. Pillsbury, 64 Fed. 841.
Von Mumm vs. Frash, 56 Fed. 830.
Coleman vs. Krump, 70 N. Y. 573, 578.

(b) *A Good Will may be invaded by Another Who Simulates Petitioner's Mark or "Dress."*

The good will of a business is deemed to have been unlawfully invaded when the marks, "dress" of goods and other indicia under which the business has been conducted have been simulated by another so that careless and unwary customers may possibly be deceived.

38 Cyc. 760, and cases cited.
Borden vs. Borden, 201 Fed. 510.
Fairbanks. vs. Bell, 77 Fed. 869; 23 C. C. A. 559 (labels shown in black and white).
Gulden vs. Chance, 182 Fed. 303.
De Long Co. vs. American P. Co., 200 Fed. 66.
Wrigley vs. Grove, 183 Fed. 99.
Kostering vs. Seattle Brg. Co. 116 Fed. 620; 54 C. C. A. 76.
Heilman vs. Independent Brg. Co., 191 Fed. 489.
Rogers vs. Simpson, 54 Conn. 545.
Garret vs. Garret, 78 Fed. 472; 24 C. C. A. 173.

National Biscuit Co. vs. Swick, 120 Fed. 1007.
Shaw Stocking Co. vs. Mark, 12 Fed. 889.
Anheuser-Busch Co. vs. Clark, 26 Fed. 410.
Pillsbury vs. Pillsbury, 64 Fed. 641; 12 C. C. A. 432.
De Voe Snuff Co. vs. Wolf, 206 Fed. 420 (and cases cited).
Ohio Baking Co. vs. National B. Co. (C. C. A. 6th Cir.), 127 Fed. 116, 120; 62 C. C. A. 116.
Waterman Co. vs. Drug Co. (C. C. A. 6th Cir.), 202 Fed. 167, 171.
Florence Mfg. Co. vs. Dowd (C. C. A. 2d Cir.), 178 Fed. 73, 75; 101 C. C. A. 565.
Upper Assam Tea Co. vs. Herbert, 7 R. P. C. 183.
Seixo vs. Provezende, L. R. 1 Cha. App. 192, 196.

(c) *Ordinary Purchaser—Character of Article—Manner of Sale.*

It is to protect the petitioner's right of selling its own that the law of trademarks and unfair competition has been established. It must include the right to sell all, to the cautious as well as the incautious. It must take into consideration (1) the character of the article; (2) the use to which it is put; (3) the kind of people who ask for it, and (4) the manner in which it is sold.

Cases *supra* and the following:
Battle vs. Finlay, 45 Fed. 796.
Liebigs vs. Chemists' etc., 13 R. P. C. 635; C. A. 13 R. P. C. 736.
Draper vs. Skerrett, 116 Fed. 206, 212.
Liggett & Meyer Co. vs. Hynes, 20 Fed. 883.
Collinspat vs. Finlayson, 88 Fed. 693.
Cochrane vs. MacNish, L. R. 1896; A. C. 225.
Simmons vs. Simmons, 81 Fed. 163.
Fischer vs. Blank, 138 N. Y. 245.
Moxie vs. Daoust, 206 Fed. 434.

II.

GOOD WILL OF THE PETITIONER.

(a) *Extent of Good Will.*

The good will of the Joseph Schlitz Brewing Company, which is a property right which the court will protect, rests, largely, in the probability that the old customers will continue their patronage and will not be misled or deceived into buying the product of another manufacturer as and for its product. The export beer of the petitioner put up in dark brown bottles with light brown labels, having thereon characteristic white script and block letterpress, and blue figure and shading, is marketed both in interstate and international commerce, and the mark, "dress" and indicia as used for twenty years constitute a part of the Brewing Company's good will. That good will is co-extensive with all states and countries where Schlitz beer is sold, including the states of Louisiana and Texas and the Republic of Mexico, where they had been in competition with the respondent for twenty years, using that characteristic "dress." (Trans. pp. 42, 46, 47, 101, 111.)

(b) *Who Are the Customers of the Petitioner?*

Schlitz beer is shipped to Central and South America, to Japan, China, India, Italy, Costa Rica, Cuba, Ecuador, Honduras, Spanish Honduras, Nicaragua, Mexico, Panama, Porto Rico and San Domingo. Upwards of fifty (50) dealers in Texas handle the Schlitz beer in bottles and the customers are recruited from all walks of life in Texas and Mexican cities. (Trans. p. 42.) It is sold to illiterate Spaniards and Mexicans (Trans. pp. 64-5); and to "common Mexicans" and "bankers" in Brownsville, Texas (Trans. p. 87); to casual customers and careless, at Temple, Texas (Trans. p. 73); to Spanish speaking people at Matamoras, Mexico (Trans. p. 85).

(c) *Character of Petitioner's Product.*

It is an inexpensive beverage. "A railroad company buying a locomotive engine would presumably give a fair degree of deliberation to the transaction and it would not be easy to deceive the purchaser." The case is quite different where the article sold is inexpensive.

(d) *How Is the Petitioner's Bottle Product Sold?*

People. who ask for beer at a bar are served a bottle over the counter and do not, at any rate as a rule, handle the bottle or examine the label. The contents are consumed on the spot and the bottle is retained by the seller.

Cochrane vs. MacNish (supra).
Moxie vs. Daoust, 206 Fed. 434.
Kostering vs. Seattle Brg. Co. (supra).
Heilman vs. Independent Brg. Co. (supra).
Trans. pp. 68, 76, 77, 78, 79, 81.

III.

PETITIONER'S MARK AND "DRESS."

(a) *Originality of Petitioner's Mark and "Dress."*

Trans. pp. 41, 42, 51, 82, 83.

Petitioner was the first appropriator of the solid body colored label in brown; it was the first brewer of beer to adopt the characteristic lettering and insignia used upon its brown label in white, and blue, and the color and arrangement of elements in its label, Exhibit "B" which it adopted in 1894 had not been previously appropriated by any other brewer or bottler of beer.

Delaware etc. Canal Co. vs. Clark, 13 Wall. 311.
McLean vs. Fleming, 96 U. S. 245.
Amoskeag Mfg. Co. vs. Trainor, 101 U. S. 51.

(b) *Essential Features of Petitioner's Mark and "Dress."*

Petitioner's Exhibit "B" filed with the complaint, also marked "Defendant's Exhibit W," submitted to this court.

(c) *Color an Element in Trademarks and "Dress" of Package.*

Wm. Wrigley, Jr. vs. Colker, 245 Fed. 907, 8 Trademark Reporter 55, where reprint of labels in colors is shown.
Anheuser-Busch Co. vs. Clarke, 26 Fed. 402.
Helmet Co. vs. Wrigley Co., 245 Fed. 824 (C. C. A. 6th Cir.).
Fairbanks Co. vs. Bell (supra).
McLean vs. Fleming (supra).
McCann vs. Anthony, 21 Mo. App. 83.
Fisher vs. Blank, 138 N. Y. 244.
[The marks and labels involved in the last four cases are reproduced in fac-simile colors in Cox's Trademark Manual.]
Johnson vs. Bauer, 82 Fed. 662; 27 C. C. A. 374.
Scheuer vs. Miller, 20 C. C. A. 161.
Lawrence vs. Tenn, 138 U. S. 537.
Stuart vs. Stewart, 91 Fed. 243; 33 C. C. A. 481.
Ohio Baking Co. vs. Nat. Biscuit Co., 127 Fed. 116.
Scriven vs. North, 134 Fed. 366; 67 C. C. A. 348.
Gulden vs. Chance, 182 Fed. 303.
Wrigley vs. Grove, 183 Fed. 99.
Kerry vs. Toupin, 60 Fed. 272.
Burt vs. Smith, 71 Fed. 161.
Carbolic Co. vs. Thompson, 25 Fed. 625.

Cleveland Stone Co. vs. Wallace, 52 Fed. 431.
Landreth vs. Landreth, 22 Fed. 41.
Lorillard vs. Wight, 15 Fed. 383.
Hostetter vs. Adams, 10 Fed. 838.
Von Mumm vs. Frash, 56 Fed. 830.
Fleishmann vs. Starkey, 25 Fed. 127.
Lalance vs. Nat'l E. & S. Co., 109 Fed. 317.
Morgan Sons vs. Whittier-Coburn, 118 Fed. 651.
Bauer vs. Order of Monks, 120 Fed. 178.
National B. Co. vs. Swick, 121 Fed. 1007.
Drake vs. Glaessner, 68 Ohio St. 337.
Caufmann vs. Schuler, 123 Fed. 205.
Hanson vs. Siegel-Cooper, 106 Fed. 690.
National B. Co. vs. Baker, 95 Fed. 135.
Sterling Co. vs. Spermine, 112 Fed. 1000.
Reynolds vs. Allen, 151 Fed. 819.
Vulcan vs. Meyers, 139 N. Y. 364.

IV.

EXCLUSIVE USE.

(a) *Petitioner's Exclusive Use of Its Marks, Brown Bottle, Brown Label, Bearing White Letterpress, for a Period of Twenty Years, as Against the World.*

Trans. pp. 42, 43, 44, 47, 52.
Petitioner's Exhibits F, G, H, I, J, K, L, M, N, O. 4, 16 and 17.

(b) *Publicity Given to Marks and "Dress" of Petitioner.*

Trans. pp. 41, 45, 46, 48, 52, and 54 to 57.
Petitioner's Exhibits Y-1 to Y-8, BB to BB-3, CC to CC-4, F, Q, S, X and DD.

(c) *Secondary Meaning.*

After twenty years of exclusive use for its bottled "Export" beer of the package exemplified by Exhibit "B" to the exclusion of the world, petitioner claims the right to those elements of this package which are original, arbitrary and fanciful, and indicate the origin of its goods. Petitioner contends that its good will is maintained and extended by its trademark label, which when first adopted and used by it, was novel and distinctive in combination, though at that time the use of some of the elements might have been publici juris, and should be protected by the courts, on the theory that after twenty years of exclusive use by the petitioner its mark has acquired a secondary meaning; has become identified with petitioner's product, and has become a part of its good will.

De Voe Snuff Co. vs. Wolff (6th Cir.), 206 Fed. 420.
American T. Co. vs. Licking Co., 158 Fed. 690.
Aluminum Co. vs. National Alum. Wks., 226 Fed. 815.
United L. & B. Co. vs. Barthel Co., 221 Fed. 456.
Coca Cola vs. Koke Co., 235 Fed. 408.
Rubber Co. vs. De Voe Co., 233 Fed. 150.
Davids vs. Davids, 233 U. S. 461.
Champion Co. vs. Mosler, 233 Fed. 112.

See also—

Crescent Tool Co. vs. Kilbourn, 247 Fed. 299.
Shredded Wheat Co. vs. Humphrey, 250 Fed. 960,

where the duty is imposed on defendant to distinguish where the appearance of an article has acquired a secondary meaning.

V.

GOOD WILL OF RESPONDENT.

(a) *The "Magnolia Brewery."*

Trans. pp. 106-108.

(b) *The "Magnolia" Brewery's first label was a white label with letterpress in black Spencerian script. An alleged trademark with a heavy annular ring in red was also shown. This label had been used by the respondent since 1893.*

Trans. pp. 107, 110, 111.

(c) *The "Magnolia" Brewery's other labels, all of which have been abandoned—"Reputation," "Milwaukee Exquisite," and "Magnolia Pale."*

Trans. pp. 111, 112, 113.

VI.

RESPONDENTS, COMPETITORS, AND FORMER AGENTS OF THE PETITIONER, ADOPT AND USE A NEW LABEL AND "DRESS" OF PACKAGE FOR BOTTLED BEER.

(a) *The "Magnolia" Brewery's knowledge of petitioner's marks, label and dress, and the extent of petitioner's good will, particularly in the states of Texas and Louisiana.*

Trans. pp. 47, 48, 110.
Petitioner's Exhibit "Z," on Transcript page 132.

(b) *Respondent's Duty Toward the Petitioner.*

The duty is imposed upon every manufacturer or vendor, in a field where he meets competitors, so to distinguish his marks, "dress" and labels under which he sells his goods from those of his rival or rivals that neither his marks, "dress" or labels will be likely to deceive the public or to mislead the illiterate, ignorant, unwary or careless buyer into purchasing his goods for those of a competitor, or to create confusion in the trade between his and a rival's articles.

Omaha Plow Co. vs. Omaha Store Co., 235 Fed. 519.
Shredded Wheat Co. vs. Humphrey, 244 Fed. (D. C.) 508.
Seixo vs. Provezende, 1 Chan. App. 192-194.
Helmet Co. vs. Wrigley, Jr. Co. 245 Fed. 824.
Amoskeag Co. vs. Spear, 4 N. Y. Spr. Ct. 599.
Wrigley Jr. Co. vs. Colker, 245 Fed. 907. (Labels shown in colors in Trademark Reporter, Vol. VIII, p. 55.)
Shaver vs. Heller Co., 108 Fed. 821, 831; 44 C. C. A. 48, 58; 65 L. R. 878.
Moxie vs. Daoust, 206 Fed. 434.
38 Cyc. 789 and cases cited Note 54.

See also:

Champion S. P. Co. vs. Mosler, 233 Fed. 112, 115.
Coca Cola Co. vs. Gayola Co., 200 Fed. 720; 119 C. C. A. 164; 211 Fed. 942; 128 C. C. A. 400.
Walker & Sons Co. vs. Grubman, 222 Fed. 478.
Chapin Mfg. Co. vs. Hendler, 231 Fed. 550, 555.
Ludlow Co. vs. Pittsburg Mfg. Co., 166 Fed. 29; 92 C. C. A. 63.
Delong Co. vs. Am. Pin Co., 200 Fed. 65.
Carbolic Soap Co. vs. Thompson, 25 Fed. 625, p. 627.
Walter Baker vs. Baker, 77 Fed. 181.

Pillsbury vs. Pillsbury, 64 Fed. 841.
Royal B. P. Co. vs. Royal, 122 Fed. 337.
Internat. Silver Co. vs. Rogers, 72 N. J. Eq. 933.
Herring, Hall vs. Safe Co., 208 U. S. 554, 560.
Merriam vs. Ogilvie, 170 Fed. 168.
Merriam Co. vs. Saalfield, 190 Fed. 934; affirmed, 198 Fed. 369.
Reed & Sons Co. vs. Frew, 162 Fed. 887.
Chickering vs. Chickering, 120 Fed. 69; 198 Fed. 958.

(c) *Essential Features of the Magnolia Brewery's New Label and "Dress" as Compared with Petitioner's Package. The Resemblances and Differences.*

VII.

THE NEW LABEL AND DRESS USED BY RESPONDENT ON A BRAND OF ITS BOTTLED BEER UNLAWFULLY INVADES PETITIONER'S PROPERTY RIGHT IN ITS GOOD WILL AND IS A FRAUD UPON THE PUBLIC.

(a) *The Intent to Commit Fraud.*

1. The resemblance between the petitioner's and respondent's marks and "dress" are not fortuitous and the court will assume that they are the result of a deliberate design.

McLean vs. Fleming, 96 U. S. 245.
Paris Medicine Co. vs. Hill, 102 Fed. 148, 151.
Caufman vs. Shuler, 123 Fed. 205.
Walker vs. Hockstaeder, 85 Fed. 776.
Fairbanks Co. vs. Bell (supra).
Taylor vs. Taylor, 23 Law Journal, Ch. 255.
Chivers vs. Chivers, 17 R. P. C. 420, 427.

De Voe Snuff Co. vs. Wolff, 206 Fed. 420.
Lambert vs. Kalish, 219 Fed. 323.

2. The abandonment of an old name, dress or mark and the adoption of a new one similar to a competitor is evidence of fraud.

Fairbanks Co. vs. Bell (supra).
Brown vs. Mercer, 37 N. Y. Super. Ct. 265.
Lever vs. Goodwin, 4 R. P. C. 492.
Avery vs. Meikle, 81 Ky. 73.
Electro Co. vs. Trask, 59 How. Pr. 189.
Celluloid Co. vs. Cellonite Co., 32 Fed. 94, 101.
Pratt's Appeal, 117 Pa. S. 401, 411.
Farina vs. Cathery, L. J. N. of C. 1867, p. 134; Cox Man. 275.
Bell & Co. vs. Bell, Cox Man. 574.
Colman vs. Farrow, 15 R. P. C. 198, 203.
Wilkinson vs. Griffith, 8 R. P. C. 370.
Edge vs. Johnson, 9 R. P. C. 134.
Lalance vs. Enameling Co., 109 Fed. 317.
Taylor vs. Taylor, 32 L. J. Ch. 256.
McAndrews vs. Bassett, 4 DeG. J. & S. 385.
Little vs. Kellam, 100 Fed. 353.
Burke vs. Cassin, 45 Cal. 467.
Rogers vs. Rogers, 77 Fed. 181.
Hires vs. Consumers Co., 100 Fed. 807.
Ainsworth vs. Walmsley, L. R. 1, Eq. 518.
Cook & B. vs. Ross, 73 Fed. 203.
Moxie vs. Baumbach, 32 Fed. 205.
Fuller vs. Huff, 104 Fed. 141, 144.

3. Agents and representatives of respondent employ respondent's new label and package as an inducement to commit fraud.

Trans. pp. 58, 76, 80, 81, 88, 108, 109.

(b) *Respondent's new label and "dress" of package may possibly deceive the careless or illiterate purchaser and thereby invade petitioner's good will; will probably deceive the careless and illiterate purchaser and thereby invade petitioner's good will. As a matter of fact respondent's new label and "dress" of package not only deceives customers of the petitioner but causes confusion in the retail trade.*

In cases of this character evidence of actual deception and confusion is not necessary. It is almost impossible to produce evidence of this kind.

Courts will grant relief against an infringement of a mark or unfair competition on a mere inspection of the marks, labels or "dress."

Kostering vs. Brewing Co., 116 Fed. 620; 54 C. C. A. 76.
Fuller vs. Huff, 104 Fed. 141.
National B. Co. vs. Swick, 121 Fed. 1007.
Liebigs vs. Chemists Co., 13 R. P. C. 635, 644.
Amoskeag Co. vs. Trainer, 101 U. S. 51, 63.
Von Mumm vs. Frash, 56 Fed. 830.
Cuervo vs. Landauer, 63 Fed. 1003.
Collinsplatt vs. Finlayson, 88 Fed. 693.

(This principle is well established. Further citation of evidence is deemed unnecessary.)

Petitioner produced evidence of actual deception and confusion.

(a) Deception of customers of petitioner. Instances of deception.

(b) Confusion in the retail trade.

VIII.

SUBSTITUTION BY TRICK OR ARTIFICE DIFFERENTIATED FROM SUBSTITUTION INDUCED BY A SIMULATED MARK, LABEL OR PACKAGE.

Hopkins on Trademarks (2d Ed.), Sec. 115, p. 276.
Morgan's Sons Co. vs. Wendover, 43 Fed. 420.
Rathbone vs. Champion, 189 Fed. 126.
Pillsbury vs. Pillsbury, 64 Fed. 841; 12 C. C. A. 432.

IX.

CONCLUSION.

ARGUMENT.

I.

Basis of Remedy.

In April, 1915, petitioner filed a printed brief and argument with the District Court, in which it contended that the remedy afforded for infringement of a trademark was the protection of the honest manufacturer's property right in his good will. This conclusion was amplified and repeated in the argument before the Circuit Court of Appeals. We deem it unnecessary now to repeat the argument then made, inasmuch as this court has announced the foregoing doctrine as the true basis for affording the remedy in trademark and unfair trade cases.

Hanover Milling Company vs. Metcalf, 240 U. S. 403.

(a) *Good Will.*

The good will, the property right which courts protect, has been variously defined: it comprehends the trademark, "dress" or insignia adopted to maintain and extend it; it extends to all of the customers of the particular business in which the mark, "dress" or insignia is used.

> "Good will has been defined by the courts to be the favor which the management of a business wins from the public and the probability that old customers will continue their patronage."
>
> *Chittenden vs. Whitbeck,* 50 Mich. 401.

> "It is to protect the plaintiff's right to sell their own that the law of trademarks has been introduced. It must include the right to sell to all, to the incautious as well as the cautious."
>
> *Brooklyn White Lead Co. vs. Masury,* 25 Barb. 516.

It is, therefore, incumbent upon the court in passing on questions involving the unlawful invasion of a good will to determine whether any of the lowliest customers of the petitioner have been deceived or fraudulently led astray.

(b) *Good Will May Be Invaded by Another Who Simulates Petitioner's Mark or "Dress."*

When a party has been in the habit of labeling his goods with a distinctive mark so that purchasers recognize the goods thus labeled as his product a competitor will be prevented from applying similar label or "dress" to a package of goods of the same description, for not to do so would permit the competitor by such simulation of the label to induce some purchasers to believe that the goods the competitor was selling were in fact the manufacture of another.

Trademarks or labels are not necessarily intended to be read by the consumer, and especially is this true where the mark is placed upon an article of small value, and which the consumer

does not always have the opportunity to examine and use. The very necessity or desirability of a mark or label to indicate origin or ownership, and the originality and distinctiveness in labels or "dress" of a product, presupposes ignorance or carelessness on the part of the ultimate purchaser. Trademarks were no doubt originated centuries ago, because purchasers could not or would not read.

The simulation of a trademark, label or "dress" of package which is calculated to deceive the most ignorant or unwary purchaser constitutes an unlawful invasion of another's property right in his good will.

(c) *What Is an Ordinary or Careless Purchaser?*

It is, however, apparent that a purchaser of automobiles will probably be an entirely different individual from the purchaser of chewing gum, tobacco or beer. The degree of intelligence and care which the purchaser of a Packard automobile exercises in the purchase of an automobile is different from the ordinary intelligence of the consumer of beer who purchases a bottle of that refreshment over the counter. One article costs four thousand dollars; the other fifteen cents. The former is purchased with deliberation; the latter is usually purchased over the counter in a most casual manner.

Judge Parker uses this language in the case of *Liggett etc. vs. Hynes,* 20 Fed. 883:

> "The difference in trademarks of the plaintiff and defendant, in this case, would perhaps be at once detected by the intelligent user of tobacco, looking for a favorite brand, just as a man of luxurious taste would discern his favorite brand of champagne. But the plaintiff is entitled to protection, as the trademark of the defendant would deceive the ordinary purchaser purchasing as such persons ordinarily do. In this we must not lose sight of the character of the article, the use to which it is put, the kind of people who ask for it and the manner in which they usually order it."

and again, in *Fairbanks vs. Bell,* 23 C. C. A. 554; 77 Fed. 869, Judge Lacombe has this to say:

"Necessarily, in applying the test suggested, viz: the likelihood of deception of an 'Ordinary purchaser exercising ordinary care,' regard must be had to the *class* of persons who purchase the particular article for consumption, and to the circumstances ordinarily attending their purchase. * * *

There is no confusion possible in the names of the articles, and defendant has inscribed its own name, 'Buffalo Soap Powder,' in bold letters, easy to read. The judge who heard the cause in circuit court was strong in the conviction that there was not a similarity calculated to mislead or deceive any buyer of ordinary prudence, that there was no danger of imposition upon any except idiots, and that people who have eyes, ears and common sense could not be beguiled by any similarity between the packages.

We are unable to reach the same conclusion. When it is borne in mind that articles of this kind, when once they are generally known, become associated in the public mind with the general appearance of the packages which contain them—with the *dress,* rather than the *name*—and that the ordinary retail purchaser of soap powder for consumption is *not usually of a high degree of intelligence, and has never had the experience of an EQUITY JUDGE in analyzing the elements which make up the general appearance of a package, it is quite conceivable that a dishonest dealer who kept complainant's and defendant's packages mingled together on the same shelves, some exhibiting the front panels and others the side panels to view, might easily palm off the one for the other upon an unsuspecting purchaser exercising the ordinary care* WHICH IS TO BE EXPECTED OF BUYERS OF SOAP POWDER FOR CONSUMPTION."

In the case of *Simmons vs. Simmons,* 81 Fed. 163, in considering a trademark applied to medicine sold to persons in the Mississippi Valley who were mostly unable to read and write, the court said:

"I have no hesitancy in saying that the facts clearly establish that the medicine constituted an unfair and ungenerous competition; that they were so dressed by him with the intent to deceive the public and lead *at least the*

> *ignorant class of persons,* who constituted the largest percentage of them in the localities in which defendant compounds and sells his medicines almost exclusively, to believe that they were purchasing complainant's medicines, which have been established for over fifty years and have become well and favorably known to the public."

As to the character of the article, in this case we are concerned with a beverage sold in bottles. The bottles are of a dark amber or brown glass and have pasted upon them a label of brown body color with white lettering thereon and a blue figure at the left-hand side. There are an infinite variety of labels used in marking beer in bottles, but no manufacturer of beer, so far as the record discloses, uses a brown label upon a brown bottle except the petitioner, and the defendant using the labels complained against in this suit.

In numerous cases the class of purchasers are mentioned. In *Wrigley vs. Grove,* 183 Fed. 99, the court says:

> "It is well known that the gum chewing community is not, as a class, drawn from the most intelligent and discerning portion of the public. The proof shows that in the city of New York the majority of customers come from the east side and is largely composed of ignorant foreigners, many of them unable to speak our language. That such customers may be induced to purchase the defendant's for the complainant's is more than probable."

The manner in which the article is sold has also been the subject of much discussion in the courts. In *Moxie vs. Daoust,* 206 Fed. 431, the court points out that the beverage was usually served to the customer in a glass filled from the bottle held in the dealer's hand, a method frequently used in dispensing the beverage sold by petitioner and respondent.

In a leading English case Lord Morris remarked:

> "People who ask for soda water at a restaurant, or call for soda and whiskey over the counter, do not, at any rate as a rule, handle the bottle or examine the label."
> *Cochrane vs. McNish,* 13 P. C. 100.

and in *Fischer vs. Blank*, 138 N. Y. 248, the court shows that the purchasers of the article in that suit were for the most part foreigners, many of whom were illiterate and could not read; that it was sold in many cases in dark shops and cellars where there was not sufficient light to enable persons to distinguish the packages which bore a general resemblance to one another.

In the Circuit Court of Appeals for the Ninth Circuit, in a case involving the sale of beer in bottles, as this, it is said:

> "A consumer who has been accustomed to purchase an article or a dress or a package which has become familiar to him does not stop to read and examine. Many of the consumers of beer are unable to read, and many are foreigners and unacquainted with the English language. All consumers, whether able to read or not, are in fact guided by the general appearance of the package or label which is before them."
>
> *Kostering vs. Seattle etc.*, 116 Fed. 620.

II.

GOOD WILL OF PETITIONER.

Extent of Good Will.

In 1893 the Joseph Schlitz Brewing Company received a grand prize at the World's Exposition for purity of its beer. In 1894 it adopted a brown label, a startling innovation, to distinguish its beer. This brown label has been continuously used since that time. The celebrity of "Schlitz" beer when respondent adopted its brown label in 1913 is best attested by the enormous sales. Nearly three hundred fifty million (350,000,000) bottles were sold in the six years preceding 1913. Ninety per cent of these were "Export" beer. The consumers of this beer, the customers of "Schlitz," were located everywhere. In Texas

nearly fifty million (50,000,000) bottles were sold during the same period through upwards of fifty agents in every section of the state.

Great pains have been taken to make "Schlitz" beer of the highest quality. Two million one hundred thousand dollars ($2,100,000.00) were spent in ten years in advertising, signs, plaques, billboards and specialties. In much of the advertising the brown bottles and the brown label separately and together were kept before the public. The brown label was pasted on every bottle of "Export" beer marketed as the distinguished mark of the petitioner. This brown label was the feature of petitioner's dress of package selected to maintain its good will. It identified the petitioner's bottle of "Export" beer to the beer consuming public. It was the means of extending petitioner's good will.

Who Are the Customers of the Schlitz Brewing Company?

The nature and extent of the custom of the petitioner is a subject which requires but little comment. The facts are not in dispute. Schlitz beer in brown bottles and bearing the brown label described in and attached to the Bill of Complaint, is sold in almost every civilized and semi-civilized country. It is sold in the antipodes, in China, India, Siberia, Australia; in New Zealand, Japan and other islands of the seas. It enjoys a ready market in South America and in the Central States; in Costa Rica, Honduras, Spanish Honduras, Nicaragua, Panama; in Mexico, as well as Cuba and Porto Rico.

These facts distinguish the instant case from many which have been decided by other courts. The trademarks and indicia —the good will—here involved have more than a local significance and value. The purchasing public of Schlitz beer is not merely the purchasing public of Texas. It also includes the purchasing public of Mexico and other countries as well. The

"unwary purchaser" whose possible deception the court is bound to consider in determining whether petitioner's good will is likely to be invaded is not only the unwary or ignorant Spaniard or Mexican in Brownsville, Texas, but also in Mexico, where respondents marketed their beer in competition with petitioner.

The testimony offered by the petitioner and the exhibits offered in court show that the simulation of the petitioner's dress has been frequent in foreign countries where the English language is not spoken; that several of the simulations in this country were used only in foreign trade.

Judge Chatfield of the New York Federal Court, in the case of *Schlitz Brewing Company vs. Interboro Brewing Company,* in rendering his decision on the motion for a preliminary injunction, used the following language:

> "These labels follow similar lines of arrangement and design as well as appearance, so that misconception could be computed to the defendant in further use of the label, and, as well, confusion might result in *export trade.*"

(The defendant in this case, a Brooklyn brewery, had not used the label complained of in export trade, but had used it only in marketing its beer in Florida.) Petitioner's Exhibit 17.

A further presentation of the differing character of the customers of the Joseph Schlitz Brewing Company is not necessary. The facts appear in the testimony taken. The court knows, as a matter of common knowledge, the different classes of people who purchase beer in Texas and in Mexico. The court knows that some are careless and unobservant; that some neither read nor write; that some do not speak the English language.

Character of Petitioner's Product.

The court will take judicial notice of the fact that the article in this case is not of large proportions like a locomotive, an

automobile or a yacht, in the purchase of which there would be a large degree of deliberation; nor is it like a package of breakfast food or a bottle of medicine, or a box of crackers which is taken home and consumed with more or less deliberation and lasts for a considerable period of time. It is a beverage dispensed in large quantities in bar-rooms in the various localities where Schlitz beer is sold, and consumed in the premises. The bottle, upon which the marks and other indicia of the petitioner are exhibited, is returned to the retailer and no opportunity for deliberation and little opportunity to examine the label is afforded the customer, and if deception has been complete, as we believe in this case, no evidence is obtainable unless the perpetrator of the fraud suffers a change of heart and confesses, a rare and improbable contingence.

How Is Schlitz Beer Sold?

The court should consider the manner in and the conditions under which Schlitz beer is sold.

With few exceptions, the decisions of the federal courts of this country, determining controversies relating to trademark rights or unfair competition, involve the simulation of a mark or package employed in the marketing of goods for *home consumption.*

The customer who calls for Gold Dust (Fairbanks case, supra) takes the article delivered to the home. The customer who calls for Sapolio or a certain kind of breakfast food, bluing, matches, coffee, tea, hooks and eyes, pills or toilet water, takes the article delivered to the home. The package remains there and its contents are gradually consumed. Although the article may have been purchased while "acting upon the moment," the customer is thereafter afforded an opportunity to discover any fraud which may have been perpetrated.

Beer and other beverages, however, are as a rule not taken to the home, when purchased, but are *consumed on the spot.*

A consumer of bottled beer, entering a bar, is usually with friends or meets friends. The refreshments ordered, including his beer, are served. He is engaged in conversation. He glances at the bottle before him. His eyes see a familiar picture; the blue, red and yellow border on white of "Budweiser" or the brown label and white lettering of "Schlitz." The conversation continues. He does not put the bottle in his pocket. He drinks his beer and leaves. He did not stop to study and reflect. He did not stop to read. "He acted on the moment."

As Lord Morris, in *Cochrane vs. MacNish,* supra, remarked:

> "People who ask for soda water at a restaurant or call for soda and whiskey over the counter, do not, at any rate as a rule, handle the bottle or *examine the label.*"

III.

PETITIONER'S MARK AND DRESS.

The petitioner was the first to use the characteristic combination of features which go to make up its trademark label.

The petitioner has used the brown or dark amber glass bottle for upwards of thirty (30) years.

The petitioner was the first to adopt and use upon its beer in bottles a label having a solid body color *other than white,* the natural color of the paper upon which the label is printed.

The petitioner was the first to use upon beer in brown or dark amber glass bottles, the light brown body colored label.

Mr. Kronshage, whose firm attended to the original registration of the label, and Mr. Bielfeld, manager of the bottling department of the petitioner, both testify that at the time of the adoption of this label with its characteristic features and solid body color, extensive research and investigations were made to insure to the petitioner upon the adoption of this label, an unusual, characteristic and distinctive mark and badge of

origin for the product of the petitioner bottled at the brewery.

Mr. Bielfeld testified that there was much comment on the type of label adopted by the petitioner and that some of its customers derisively referred to the label as a bay rum label.

So far as the petitioner was able to learn at the time, and so far as the evidence discloses, the petitioner did, in the adoption of its label, obtain an unusual, characteristic and original trademark label not then in use by any manufacturer of beer in bottles.

The trademark label of the petitioner originally adopted in 1894 is a parallelogram in solid body color brown and is pasted upon brown bottles containing petitioner's beer. It bears on the face white characteristic script and block lettering and the figure of a blue globe in distinctive arrangement. This trademark label has been exclusively used by petitioner in commerce between the several states and in foreign countries, including the states of Louisiana and Texas, and in Mexico, where the defendant has done business for upwards of twenty years. This label is used in two sizes and is shown in color, letterpress and insignia thereon in the printed transcript submitted herewith, Exhibit "A," on page (13) the quart bottle size, and Exhibit "B," page 21, the pint bottle size. It was originally adopted because of its unique features. Application for registration was made in February, 1895, in the United States Patent Office, and the label duly registered April 9, 1895, trademark No. 26385. Reference to the color of the background is made as follows:

> "The color and background of the trademark as used with the various brands of malt liquors varies, and aims to correspond with the color of the beverage so as to indicate at a glance the brand itself."

The rights under this registration were reasserted in the Patent Office at Washington, D. C., by the petitioner as late as July 16, 1912. (Trans. pp. 120, 137.) The particular light

brown body color upon the labels, Exhibit "A" and Exhibit "B" is the color used since the adoption of the label in 1894, upon all export beer in bottles put up and labeled by the petitioner at the brewery. Export beer is the brand customarily sold in commerce between the several states, including Louisiana and Texas, and in foreign countries, and the small size label, Exhibit "E," on pages 13, 21 and 121 of the Transcript, was the label used on the bottles contained in 817 car load and half car load shipments ordered by the respondent while agent of the petitioner, to be delivered to Texas and Louisiana points between the years 1902 and 1912.

The Essential Features of Petitioner's Marks, Collocation and Dress.

The essential features of the marks, collocation and dress of the product of the petitioner, bottled by itself, as offered for sale to the public and as declared in the Petitioner's Bill, are as follows:

1. A brown bottle.
2. A label rhomboidal in shape but almost square.
3. A label with a solid body color.
4. A label with the body color brown.
5. A label having a marginal line.
6. A label having a marginal line in white.
7. A label showing a globe, the general trademark of the petitioner, near the left margin.
8. A label showing the general trademark of the petitioner in the color blue, near the left margin.
9. A label showing the name of the beer (Schlitz) in heavy ornamental script.
10. A label showing the name of the beer (Schlitz) in heavy ornamental script in white.
11. A label showing the name of the beer (Schlitz) in heavy ornamental white script slanting upward from left to right.

12. A label showing the name of the beer (Schlitz) in heavy ornamental white script slanting upward from left to right with a paraph underneath.

13. A label showing the name of the beer (Schlitz) in heavy ornamental white script with paraph underneath in white.

14. A label showing the name of the beer (Schlitz) in heavy ornamental white script with paraph underneath shaded in blue.

15. A label showing other wording (The Beer That Made Milwaukee Famous) in plain block lettering underneath the name of the beer (Schlitz).

16. A label showing other wording (The Beer That Made Milwaukee Famous) in plain block letters in white underneath the name of the beer (Schlitz).

These constitute the essential features of the marks and collocation of the petitioner as well as the dress of its product as it is offered to the public when bottled by the petitioner. These are the essential features which go to make up the mental picture which in the public mind is associated with petitioner's product and which the public recognizes as badges of origin.

(c) *Color an Element in Trademarks and Dress of Package.*

Petitioner's counsel on the hearing of this case in the District Court and upon the argument in the Circuit Court of Appeals endeavored to enlighten the courts as to the exact position of the petitioner regarding the color of its label.

Counsel for the respondent charged that petitioner was asking for a monopoly of the color brown, to which petitioner's counsel answered that petitioner made no such claim to the color brown in and of itself, but did claim, and the record disclosed that the petitioner claimed, the brown colored label in *combination with the other elements which go to make up its trademark label.*

The rule for which counsel has uniformly contended is better stated than counsel can state it by Mr. Justice Holmes in the case of *New England N. E. Awl Co. vs. Marlborough,* 168 Mass. 154, cited by the Circuit Court of appeals on page 821 of its reported opinion:

> "Of course a person cannot claim the monopoly of a color in connection with a particular line of trade, and very likely not in connection with the labels of a certain kind of goods generally. *But the most universal element may be appropriated as a specific mark of a plaintiff's goods, if it is used and claimed only in connection with a sufficiently complex combination of other things.* The plaintiff did not claim the exclusive right to brown labels for awls, but it claimed the exclusive *use of the brown color in combination,* which we have described."

In this case the petitioner claims the brown label in combination with the other elements heretofore described, and particularly set forth in the complaint and uniformly alluded to in the testimony.

When the Circuit Court of Appeals eliminates the brown color from the label it bases its decision upon elements, which, aside from the color, have never been used by the petitioner to identify its goods.

As counsel for the petitioner understood the rule regarding color, it would have been unavailing for petitioner to have claimed an exclusive right to a particular color except the color "be impressed in a particular design as a circle, square, triangle, a cross or star," citing:

> "Color, except in connection with some definite, arbitrary design, such as when impressed upon a circle, star, cross or other figure, or employed in definite association with some characteristics which serve to distinguish the article as made or sold by a particular person, is not the subject of monopoly as a trademark."
>
> *Leschen Rope Co. vs. Broderick,* 201 U. S. 166, p. 171;
>
> or
>
> *Newcomer vs. Scriven,* 168 Fed. at p. 623.

No other manufacturer of beer in bottles had ever used a brown label in similitude to petitioner's label upon beer in brown bottles with the acquiescence or consent of the petitioner or its officers.

In at least one instance, "Exhibit G," the only points of similarity were the brown label with white lettering, Peterson's standard beer in similitude of the petitioner's label, and the use of the label objected to has been discontinued. Petitioner did not rely solely upon the shape or size of its label, but particularly objected to infringements by the simulation of the color of the background, color and style of letterpress and color of figure on the left hand side, that is, any combination which in general appearance suggested the exclusive brown label of the petitioner with its white letterpress and blue figure thereon.

If the Circuit Court of Appeals had followed the decisions applicable to the situation presented and adjudicated the trademark of the petitioner, adopted in 1894 and continuously thereafter used in commerce between the several states and in foreign countries, it could, we submit, have come to but one conclusion, that the petitioner was entitled to protection of its trademark, the color of which was its most essential element.

In support of this conclusion we respectfully direct the court's attention to the following cases: Mr. Justice Clifford, in *McLean vs. Fleming,* 96 U. S. 245, p. 255, says:

> "Mention may also be made of the fact that the color of the label and the wax impression on top of the box are well suited to divert the attention of the unsuspecting buyer from any critical examination of the prepared article."

At page 256 the court says:

> "Difference between those exhibits and Exhibits 'F' and 'H' of the complainant undoubtedly exist; and still it is manifest that the general appearance of the package in the respects mentioned, and others which might be sug-

gested, is well calculated to mislead and deceive the unwary and all others who purchase the article without opening the box and examining the label."

We direct the court's attention to the language of Mr. Justice Holmes in New England Awl Company case, quoted in the report of this case, 241 Fed. Rep. p. 821, and previously here referred to.

In *Anheuser-Busch Brewing Association vs. Clark,* 26 Fed. 410, complainant was the first to use for bottled beer a label with a diagonal red band extending *downward* from left to right, with the name of the kind of beer appearing in white letters upon the band, an injunction was granted though the labels were otherwise strikingly dissimilar.

In *G. Heilman Brewing Co. vs. Independent Brewing Co.,* 191 Fed. 489, the imitation of a conventional design in general color and arrangement of elements was enjoined.

And in *Kostering vs. Seattle Brewing Co.,* 116 Fed. 620, the court awarded an injunction upon the general appearance and dress of the package.

Other cases upon which the petitioner relied, and to which it cited the Circuit Court of Appeals, are *Fairbanks vs. Bell,* 77 Fed. 869, 23 C. C. A. 554. The picture of the package appears on page 559 of the C. C. A. reports. The court held that notwithstanding the distinctive features where the yellow color of the complainant's package was copied by the defendant, there was a manifest intent to simulate complainant's packages and an injunction should issue. The court in that case had this to say about the color:

"Color, undoubtedly, is a most important element in all package combinations; but there are other elements as well which go to make up the entire combination. * * * It would not be giving the complainant a monopoly of yellow to restrain the sale of a particular yellow package, where, in addition to the color, a number of other elements each differing more or less from its analogue in complainant's package had been so collocated together as to produce a

general appearance calculated to delude the unwary purchaser." 77 Fed. p. 876.

This is precisely what the respondent did in the present case and this was the contention of the petitioner's counsel on the argument of this case, and the theory upon which the case was tried from the commencement of the suit.

In *Ohio Baking Co. vs. National Biscuit Co.*, 127 Fed. p. 116, and in *National Biscuit Co. vs. Swick*, 121 Fed. 1007, the trademarks shown in reports were quite dissimilar, but printed upon bright red background, and the use of the mark was enjoined, on account of the color.

In *Gulden vs. Chance*, 182 Fed. 303, the labels printed in colors opposite page 303 in the report, the colors and shape of labels are similar, but the details of printed matter upon them are different, but the court awarded complainant relief, and so in the case of *Wrigley vs. Grove Co.*, 183 Fed. 99, the court awarded complainant relief where the color scheme of plaintiff's gum box was imitated, although the details of the labels were quite different.

Since this case was argued in the Circuit Court of Appeals, numerous other cases have been decided in which the color of a label or dress of the package have been the subject of consideration.

In *Helmet Co. vs. Wrigley, etc.*, 245 Fed. 824, (C. C. A. 6th Cir.), Circuit Judge Warrington says:

> "While there are different features of these packages, both in words and in colors, yet there is a striking similarity in their general appearance. * * * The degree of resemblance found here can receive but one interpretation; it required study and ingenuity to bring it about; it is calculated to confuse and deceive. One of the controlling reasons for this is to be found in the skillful association of colors employed by defendant on its counterbands and on the wrappers of the individual pieces of chewing gum, and particularly the use made of the pink."

In *Wm. Wrigley, Jr., Co. vs. Colker*, 245 Fed. 907 (E. Dist. Ky.), the court says:

> "Why does defendant select pink when he has all the other colors of the rainbow to make a selection from—blue and violet and yellow and green? But he takes the complainant's color. And so as to these other markings."

On the hearing of the motion for a preliminary injunction in this case, petitioner went to much trouble and expense to prepare a large number of labels, showing a variety of combinations in colors distinctive from the petitioner's combination, and all of them more harmonious with the brown color of the bottle. Notwithstanding the infinite number of combinations it might have adopted, respondent chose the one which it knew indicated to many the petitioner's product, and justified it on the grounds that the petitioner could have no monopoly on the color brown, and that the brown and white combination was more harmonious on the brown bottle.

We submit that when the respondent entered the field of selling beer in brown bottles, mindful of the rights of the petitioner to its distinctive dress of that color of package, he owed a duty to the petitioner to so distinguish his goods that the most humble purchaser of petitioner's beer would not be misled.

IV.

EXCLUSIVE USE.

(a) *Petitioner's exclusive use of its mark.*

In addition to the registration of its trademark label in the Patent Office of the United States, the petitioner has registered its trademark label in most of the countries of the world where its beer is sold and where trademark registrations are permitted.

Notwithstanding the fact that in many of the countries where petitioner's beer is sold the people do not speak the English language and therefore cannot readily distinguish or retain an exact picture of the petitioner's label because of inability to read the wording thereon, the petitioner has registered the mark and uses it in commerce with the exact wording and other features disclosed in and upon the bottle of petitioner's product filed in this suit and marked Exhibit "B." The petitioner has warned its dealers and other breweries to beware of infringements of its characteristic label. (Trans. p. 42.)

Mr. Bielfeld has identified a number of labels having a brown body color and other features which the petitioner considers infringements of its trademark label. In every instance that has come to the attention of the petitioner steps have been taken to prevent the use of these alleged infringing labels by other manufacturers and so far as the petitioner knows in every instance, with the exception of the case at bar which petitioner is now prosecuting, the use of the alleged infringing labels has been stopped either by agreement with the users thereof by appropriate legal steps taken to that end. (Trans. pp. 42, 43, 44.)

In all of the instances of alleged infringement referred to by Mr. Bielfeld in his testimony, the essential features only were simulated by the alleged infringers. In some of them only the color was the distinguishing feature and in all of them the wording upon the labels was different.

Many of the witnesses mention some seven brands of beer that are sold in the Texas market. Some of these brands are put up in black or in brown or dark amber glass bottles. None of them (with the exception of the newly adopted package of the respondents) bear a label which is similar to the petitioner's in color or any of the features of such label. (The use of another label in Texas to which we attempted to call the lower court's attention was enjoined during the trial of this case.) (Trans p. 64.)

Until the acts of the respondent herein complained of, the petitioner was in the exclusive enjoyment in Texas and vicinity of its original and characteristic label and of the color of the letterpress and general appearance of its dress and package hereinbefore described. And, so far as the petitioner knows, it is in the exclusive enjoyment of its trademark label and all of the characteristic and distinguishing features and collocation of elements which go to make up its peculiar and distinctive dress of package, everywhere in the United States and in foreign countries where its product is sold. (Trans. p. 44.)

(b) *Publicity given to the Marks and "Dress" of Petitioner.*

Generally speaking, the brown label of the petitioner has appeared upon each of three hundred fifty million brown glass bottles of its product which were distributed over the United States and in foreign countries. During the years 1900 and 1912, upwards of Two Million One Hundred Thousand Dollars ($2,100,000.00) was expended for advertising in newspapers, by means of signs and show cards, by magazines and printed matter. Plaques with fac simile pictures of the brown label in colors and pictures in colors of the bottle with the brown label thereon, were distributed to the various representatives of the company throughout the world where its beer is sold. In addition to the newspaper and magazine advertising, posters were displayed throughout different towns in Texas. Millions of letterheads, billheads and envelopes each containing a fac simile of the label in miniature were furnished to all of the representatives of the company for their use. (Trans. pp. 46, 47, 54 to 57.)

In the state of Texas the beer of petitioner bottled in brown or dark amber glass bottles bearing the characteristic label of the petitioner, set up in this cause, has been distributed and consumed by the public for upwards of twenty (20) years.

During the six years between 1906 and 1912, upwards of

fifty million bottles of petitioner's product in brown or dark amber glass bottles bearing this distinctive label of light brown body color and with the other features and insignia thereon were consumed in the state of Texas. (Trans. p. 45.)

In much of its advertising petitioner has displayed its label and bottle in colors to the public. (Trans. p. 47.)

Evidence was adduced on the trial of the use of posters in colors containing such label and package, of miniature fac similes, in colors, of the label upon letterheads, billheads, statement heads and envelopes, used not only by the petitioner in its correspondence and business dealings, but by its agents and representatives everywhere, including the state of Texas; and also of the plaques and signs on metal and glass souvenirs, pictures and pamphlets containing this label or package in colors. (Trans. p. 52.)

So that the petitioner in addition to manufacturing a superior product, the best it can produce by the aid of distinguished fermentologists and the general advertising of its product to the public has in many ways kept before the public its original and characteristic trademark-label and the picture in colors of its bottle and the label thereon. So that in addition to the consumers of its product millions in number, the public generally are acquainted with the general appearance in coloring, letterpress and insignia of the petitioner's label and its distinctive and characteristic dress of package.

(c) *For twenty years petitioner has used for its bottled "Export" beer a package exemplified by "Exhibit B," to the exclusion of the world.*

"Secondary meaning" is a term which the courts of this country have hesitated to define. When does the color or any other distinctive feature of the "dress" of a package acquire a "secondary" meaning?

A study of the cases cited in the brief or the argument

discloses that the term has been applied to a "word" which had come to identify a certain product, and also to features of a patented article, the patent on which has run out where they are nonfunctional and have come to identify the product of the original manufacturer.

It is quite customary with the traveling public to order "Worcestershire Sauce" with fish. What kind of a sauce does the public expect to get? How does the public recognize the sauce it calls for? We venture to say that anyone venturing to order "Worcestershire Sauce" expects to be served with a sauce made by Lea & Perrins of England. Can any member of this court, on the first reading of this brief, say what is contained on the label of Lea & Perrins sauce? It is well known that this particular sauce carries a red label. It is not known as the red label sauce, but who can describe or state what appears by the way of letterpress on this label?

Probably the most famous and generally purchased catsup on the market is manufactured and sold by Curtis Brothers of New York. Possibly the members of this court are not familiar with the Curtis' catsup, but a blue label is its mark of identification. It is not known as "Blue Label Catsup," but customers rely on the color of the label.

Kingsford's Corn Starch is now manufactured by the Standard Oil Company. How do housewives recognize the package? That is, your wife and my wife; your child or my child; your maid or my maid? Do they accept a package of cornstarch as and for Kingsford's because the package is in a yellow wrapper, or do they stop to examine and read the label?

Is Palm Olive usually purchased by persons who carefully examine and read the label, or by persons who accept the olive green wrapper as the mark and sign of the real product? Is Gold Dust Washing Powder or Dutch Cleanser purchased by the maids and charwomen after a careful examination and reading of the letterpress appearing on the package or the color and general appearance of the package? Does the purchaser of

the French champagne "Veuv Cliquot" carefully read the letter-press of the yellow label?

Probably no one is more particular than an Englishman who drinks ale. He will order "White Label Bass" bottled by McMullen of New York. or "Red Label Bass," bottled by Burke of Liverpool; or "Dog's Head Bass," bottled by Reed Brothers of London. All of these are various bottlers of Bass Ale.

The Schlitz Brewing Company has been bottling its own beer for over twenty years. For twenty years its product destined for interstate and international trade has been put up in a brown bottle bearing a brown label. No individual bottler has been permitted to put his individual stamp on the bottled product of the petitioner. It has always sold under its own colors. The petitioner's beer is known as Schlitz to the consuming public, although it is identified by a brown label. A beer in a brown bottle bearing a brown label to the consuming public means "Schlitz." "Schlitz" is the brown label beer,

The use of a brown label on a brown bottle for a period of twenty years to the exclusion of the world has made "Schlitz" beer the brown label beer.

V.

GOOD WILL OF RESPONDENTS.

(a) *The Magnolia Brewery.*

The Houston Ice & Brewing Company Brewery has since the organization of the corporation in 1902 been known as the Magnolia Brewery. When it was organized in 1902 it purchased the Magnolia Brewery and all of the assets from the trustee of the former Houston Ice & Brewing Company. It has been known from the beginning as the Magnolia Brewery, properly known as such. The corporate name is not known by many persons now. (Trans. pp. 108, 112.)

The respondents sometime in 1894 put upon the market a beer bottled in clear glass bottles bearing a white label, upon which was imprinted an alleged trademark about the center of the label, the distinctive feature of which was a red annular ring. The word "Southern Select" and the name of the brewing company were in ordinary script and other indicia appeared on the label.

The name "Southern Select" was the principal name under which the company bottled its beer and the white label is still used, approximately fifteen per cent of the bottled beer of the brewery having been put up in the light bottles during the year preceding the trial.

(c) *The Magnolia Brewery's Other Labels.*

McAutrey, secretary of the respondent company, testified to the use by the brewery of a "Magnolia Pale" label, "Reputation" label, "Milwaukee Exquisite" and a number of near beers which were put out under the near beer labels. All of these other labels had been abandoned and a considerable quantity of the respondent's product put up in bottles was sold without any label at all. The "Milwaukee Exquisite" label was abandoned because the company believed a law had been enacted prohibiting the use of geographical names in that manner. (Trans. p. 112.)

VI.

RESPONDENTS, COMPETITORS AND FORMER AGENTS OF PETITIONER, ADOPT AND USE A NEW LABEL AND "DRESS" OF PACKAGE FOR BOTTLED BEER.

(a) *The "Magnolia" Brewery's knowledge of petitioner's marks, label and "Dress" and the extent of petitioner's*

good will, particularly in the States of Texas and Louisiana.

There is no dispute of the fact that the respondents were acquainted with the petitioner's label and dress of package.

From the year 1900 to the year 1912 Houston Ice & Brewing Company was a distributor of petitioner's product bottled in brown or dark amber glass bottles with the distinctive and characteristic brown label thereon.

(b) *Respondent's Duty Toward the Petitioner.*

In connection with the trademark and label cases and cases where the "dress" of a petitioner was simulated, in many instances the duty of the defendant to distinguish his goods was commented upon. Indeed, in all the cases where relief was denied, it was denied on the conclusion of the court that the label or "dress" had some distinctive characteristic so that the customers of the petitioner would not be misled. The duty to distinguish had been performed.

Of recent years the courts have been more willing to specify and require the defendants by express provisions in the decree, to distinguish their goods when they come into the field previously occupied by a competitor. The duty to distinguish is now a fixed principle of trademark and unfair competition law.

The rule as thus developed has recently been very succinctly stated in the case of *Moline Plow Co. vs. Omaha Iron Store Co.*, 235 Fed. 519.

This rule is repeated in our Brief of the Argument under this title, and the cases through which the duty of the defendant in that behalf has been developed by the courts, are cited

(c) *The Essential Features of Defendant's Marks, Collocation and "Dress."*

We direct the court's attention to the labels adopted by the respondent about the year 1913, after it ceased to represent the petitioner as a distributor of its product. Although we appreciate that a description of the respondent's label may be unnecessary, we desire to present to the Court the essential features of the marks, collocation and dress in which the defendant offers for sale to the public a part of its product bearing the labels complained of by the petitioner, arranged in an equal number of paragraphs with the description of the petitioner's collocation and dress. The simulations are in italics. These are as follows:

1. *A brown bottle.*
2. A label square in shape.
3. *A label with a solid body color.*
4. *A label with the body color brown.*
5. *A label having a marginal line.*
6. *A label having a marginal line in white.*
7. *A label showing a circular figure,* the general trademark of the respondent, *near the left margin.*
8. *A label showing the general trademark* of the respondent, with annular ring *in the color blue, near the left margin.*
9. *A label showing the name of the beer* (Southern Select) *in heavy ornamental script.*
10. *A label showing the name of the beer* (Southern Select) *in heavy ornamental script on white.*
11. *A label showing the name of the beer* (Southern Select) *in heavy ornamental white script slanting upward from left to right.*
12. *A label showing the name of the beer* (Southern Select) *in heavy ornamental white script, slanting upward from left to right with a paraph underneath.*
13. *A label showing the name of the beer* (Southern Select) *in heavy ornamental white script with the paraph beneath, in white.*
14. *A label showing the name of the beer* (Southern Select) *in heavy ornamental white script with the paraph underneath, shaded in blue.*
15. *A label showing the other wording* (Houston Ice & Brewing Company) *in plain block lettering underneath the name of the beer* (Southern Select).

16. *A label showing other wording* (Houston Ice & Brewing Company) *in plain block letters in white underneath the name of the beer* (Southern Select).

Every essential feature of the petitioner's mark and dress of the package is simulated by the respondent in the use of these labels.

There are slight differences in only four minor particulars. First: The petitioner's label is rhomboidal in shape but almost square, whereas the respondent's is square. Second: The respondent's label upon pint bottles is somewhat larger than the label used by the petitioner upon pint bottles. Third: There are differences in the design of the circular trademark, although respondent has adopted a blue annular ring instead of a red one used by it for many years prior to the change in the label. Fourth: The wording appearing in small letterpress is different.

The color, the letterpress, the arrangement of lettering and indicia upon both labels are identical.

There is no distinguishing feature between the respondent's and petitioner's label in color, arrangement or letterpress which would attract the attention of an "unwary" or careful purchaser of beer in bottles.

In the adjudicated cases arising because of alleged simulation where injunctions were refused, the courts acted upon the showing that the differences were so gross, or there were added to the label or dress such distinguishing features or characteristics that confusion was impossible and substitution could only be made by trick or artifice of the retailer.

For example, in the case of *Lorillard vs. Peper,* 86 Fed. 956; 30 C. C. A. 496, the coloring of the letters was different and there was a marked difference in the coloring of the package and the shape of the type.

In *Postum Cereal Co. vs. American H. F. Co.,* 119 Fed. 848; 56 C. C. A. 360, the defendant's package bore the distinguishing feature of a large red heart which was not present upon the package of the complainant.

That except for these unusual distinguishing features, the results in the cases cited would have been different, is evidenced by the language of Justice Brewer in the *Lorillard case,* supra, in which he says:

> "In determining the question of fradulent imitation of packages and labels merely noting the points of difference or similarity is not sufficient, the package must be considered as a whole."

As to a particular mark or "dress" which by being used in connection with articles of trade of its manufacture has acquired an understood reference to the originator or manufacturer of those articles, the first appropriator has the right to protection against persons who simulate *the general features* of such mark or "dress."

Courts of equity have so uniformly held that a manufacturer will be protected in *the general appearance* of his original and exclusive mark or dress of package (regardless of the wording or differences upon the infringing label, if there are marked similarities) that we felt and still feel that petitioner was entitled to an injunction merely upon the inspection of the two packages bearing these two labels.

VII.

THE NEW LABEL AND "DRESS" USED BY RESPONDENT ON A BRAND OF BOTTLE BEER UNLAWFULLY INVADES PETITIONER'S PROPERTY RIGHT AND IS A FRAUD UPON THE PUBLIC.

The Intent to Commit Fraud.

The resemblances between petitioner's and respondent's marks and "dress" are not fortuitous and the court will assume that they are the result of deliberate design.

The questions which confront this court at the very threshold of a consideration of this case are:

"Why did the defendant adopt a label for its bottled lager beer which in so many respects resembles the label and trademark of the petitioner?" "Why did the defendant select one certain collocation of design, lettering, color and general arrangement, out of numberless possible collocations, which should so nearly resemble the general appearance of the collocation of the petitioner?"

The respondent was at one time agent of the petitioner, and between 1900 and 1912, both inclusive, sold upwards of twelve million (12,000,000) bottles of petitioner's beer. It knows the beer trade in Houston and the state of Texas. It is familiar with the popularity and of the prestige enjoyed by different beers marketed in its immediate environment, and the value which attaches to the trademarks and other indicia employed for the purpose of designating the origin and ownership of Schlitz beer and the various other beers so marketed.

"When a defendant so circumstanced and having such specific and peculiar knowledge of the trade in the commodity which it manufactures, adopts a dress for its goods which in many of its salient features resembles the dress employed upon the similar product of some well known manufacturer, the court will say that such resemblance is not fortuitous, but that it is intentional; that such resemblance is for the purpose of pirating upon the trade of the other manufacturer and for the purpose of inducing the unwary and careless purchaser to buy goods of his manufacture, believing them to be the manufacture of the other. *That the defendant resorts to such a fraudulent design is the best evidence of successful deception. Fairbanks Co. vs. Bell,* supra.

As Judge Lurton well said in *Paris Medicine Co. vs. Hill,* 102 Fed. 148, 151:

> "When there are found strong resemblances, the natural inquiry for the court, why do they exist? If no suffi-

cient answer appears, the inference is that they exist for the purpose of misleading."

See also *Taylor vs. Taylor, 23 Law Journal,* Ch. 255, to the same effect, and *Hiram Walker & Sons Co. vs. Hockstaeder, et al.,* 85 Fed. 776. In *Cauffmann vs. Schuler,* 123 Fed. 205, the court says:

> "It is not necessary that the resemblance should be such as would deceive first or intelligent purchasers. It is sufficient if it is calculated to deceive the unwary and incautious or the ignorant purchaser. * * * It is true that there are differences in the labels, such as substitution of the words 'Imperial' for 'Cauffmann,' the omission of the words 'Celebrated' and other differences, such as the wording of the 'caution' and the name subscribed thereto. It is not, however, the dissimilarities which are the test, but the resemblances. * * * *I am unable to account for the numerous resemblances referred to, except as the result of design. There could be but one motive for dressing defendant's goods in a garb so nearly like complainant's, and that was to acquire a part of the trade which the complainant had built up for his goods, and engage in a competition in trade, which the courts of equity hold to be unfair."*
>
> Preliminary injunction granted.

Mr. Justice Farwell, in *Chivers vs. Chivers,* 17 R. P. C. 420, 427, says:

> *"It does not lie in the mouth of a rogue, when he is found to be a rogue as a fact, to say that his roguery was so clumsy that it could not possibly succeed."*

(2) *Abandonment of Old Name, Dress or Mark and the adoption of a new one similar to Petitioner's is Fraud.*

The Houston Ice & Brewing Company's brewery has, since the organization of the corporation in 1902, been known as the "Magnolia Brewery."

Some time in 1894 it put upon the market a beer bottled in white bottle bearing a white label, upon which was imprinted

an alleged trademark, the distinctive features of which was a red annular ring, and the words "Southern Select" in ordinary, Spencerian script, and other indicia.

In 1913, after the respondent's relations as distributing agent for the petitioner had been severed, it put upon the market beer bottled in brown bottles, bearing a brown body colored label, upon which there is imprinted an alleged trademark, the most characteristic feature of which is the color blue, and words printed in white ornamental script and other indicia.

In *Fairbanks vs. Bell,* 23 C. C. A. 554; 77 Fed. 869, Judge LaCombe says:

> "It may fairly be assumed that the individual who designed defendant's yellow and black package was an expert, familiar with the trade; that the changes he made in the *old package* were all in the direction of complainant's package is manifest; that he was intelligent enough to make such changes in order to accomplish a definite object will surely not be disputed; and that such object was the production of a package resembling complainant's is the irresistible inference. * * *
>
> "We are not left to inferences, however, to determine whether that purpose has been accomplished. In many cases, where simulation is plain, injunctions have been issued without proof of specific instances of deception."

In a recent case, *Helmet vs. Wrigley,* 245 U. S. 824, before the Circuit Court of Appeals for the Sixth Circuit, Warrington, Circuit Judge, says:

> "While there are different features of these packages, both in words and colors, yet there is a most striking similarity in their general appearance. Complainant's product, it is true, can be distinguished from defendant's product when the packages are examined together for the purposes of comparison; this can be done too when they are examined separately by one who is familiar with the two sets of packages, since he can do so through the presence or absence alone of Wrigley's name; but the identity is so marked that the average user desiring the product of either producer would in all likelihood be misled into buying the product of the other. The likelihood of confounding de-

fendant's brands with complainant's brand would naturally occur in respect of an inexpensive article such as chewing gum. Any tendency to confuse users ought to suggest to manufacturers and dealers avoidance of similarity, rather than its cultivation. The degree of resemblance found here can receive but one interpretation; it required ingenuity and study to bring it about; it is calculated to confuse and deceive. One of the controlling reasons for this is to be found in the skillful association of colors employed by defendant on its counterbands and on the wrappers of the individual pieces of chewing gum, and particularly (except as to one) the use made of the pink. The only answer that the president of defendant company could give to the question why it was necessary to 'adopt a pink wrapper for each individual stick' was:

> 'Because pink poster paper is the cheapest paper for printing. Some of the high priced goods have white and some pink, but pink is the cheapest paper.' "

In an opinion rendered in *Wm. Wrigley, Jr., Co. vs. Colker,* 245 Fed. 907, as appears by an exhibit here, Judge Cochran said:

> "The defendant has the right to use spearmint to flavor his gum, and to sell it. But why not wrap it in a blue package? I have an idea that if you would put it up in a blue package, the complainant would not complain. Why does he select pink, when he has got all the other colors of the rainbow to make his selection from—blue and violet and yellow and green? But he takes the complainant's color. And so as to these other markings. Wrigley has his lettered in red and so is Colker's lettered in red. Other markings are in green on Wrigley's product, and so is Colker's in green, and it is that way all around, it is in the same colors exactly. There is no other conclusion that one can come to, than that he adopted that dress in order to get Wrigley's business."

As Judge Lacombe said in *Lalance & Grosjean Mfg. Co. vs. National Enameling & Stamping Co.* (C. C.) 109 Fed. 317, 318:

> "It is no doubt true that no one can have a trademark monopoly in color of paper, or in shape of label, or in color of ink, or in one or another detail; but a general collocation of such details will be protected."

Helmet Co. vs. Wm. Wrigley, Jr., Co., 245 Fed. 824.

The many exhibits before the court show that it is easy to avoid simulation.

The only explanation given by respondent was that the color harmonized with the brown bottle. We can only come to the irresistible conclusion that Judges Lacombe and Warrington came to in the foregoing parallel cases, the object was the production of a package resembling petitioner's. We submit under all the circumstances this is the only possible inference.

(a) *Agents and representatives employed respondent's new label and package as an inducement to commit fraud.*

The most striking evidence of the natural and probable result of respondent's adoption of the brown label upon beer in brown glass bottles is found in the conduct and statements of the agents and representatives of respondents who attempted to sell and did sell to the customers of the petitioner the product of the respondent.

The naive explanation of Craeger, who was an agent of respondent (Trans. 106, 80) (copied in this brief p. 8), is convincing evidence, not only of the fact that the probable result of the use of the brown label upon a brown bottle would be an unlawful invasion of petitioner's good will, maintained and extended by the use of a brown trademark label but also of the fact, that by the adoption of a brown label in connection with the sale of beer in a brown bottle, the respondents deliberately intended to steal as much of petitioner's good will as possible by deceiving petitioner's ultimate consumers; and to place in the hands of the retail dealer an instrument of fraud.

These are the facts. Craeger's argument appealed to Tomlinson. Tomlinson bought defendant's product, and he says that the similarity between the packages was so great that his clerk (white) confused the packages on a number of occasions

and served the "Magnolia" Brewery's "Southern Select" beer for Schlitz, although he had been warned to be careful not to do so.

But that is not all of the evidence. Craeger was the only traveling representative of the respondent who was called by respondents to testify at the trial. Another representative, DeVillier, it was said, was dead. But two others, Jesse Perez of Mission, Texas, and Harlan of Beaumont, were still living.

Two witnesses testified of the activities of DeVillier. Blum of Temple, Texas, said DeVillier told him:

> "If you had tried to sell our beer instead of Schlitz you might have made lots of money. * * * Q. He said their new bottled beer put up in brown bottles and bearing their brown label could be sold for Schlitz?
> A. Yes, sir." (Trans. pp. 58, 59.)

Peter Breit of Pharr and Dana, Texas (near Mission), said DeVillier and Jesse Perez had told him practically the same thing and admitted that he had actually accomplished the passing off and substitution of respondent's beer so marked as and for the beer of the petitioner. (Trans. p. 88.)

Perez conducted respondent's cold storage plant at Mission.

Harlan was the representative of the respondent company at Beaumont, Texas. The witness Fischer testified that Harlan had induced him to buy the "Magnolia" Brewery's "Southern Select" beer in brown bottles with a brown label, on the representation that it could be sold as and for Schlitz beer; and that he sold it "right along for such." (Trans. p. 76.)

Some one has said that fraud is only committed "in the dark, obscure alleyways of human depravity." Another, that actual proof of an intent to defraud is impossible except by confession; that intent is a "matter of mind," a "matter of thought," a "condition of thought," and "usually must be inferred or implied by the court."

In *Von Mumm vs. Frash, supra,* the court says:

> "It is not likely that the knave who perpetrates the fraud * * * will disclose himself to the complainant; and the ultimate consumer, if cognizant of the fraud practiced upon him, could not, unless by mere accident, be known to the complainant."

How many times Craeger, DeVillier and Perez made representations that the "Magnolia" Brewery's beer in brown bottles with brown labels could be sold for Schlitz petitioner does not know and will not know; nor does it know or will it know the names of its retail customers who responded to this appeal to defraud. The undisputed evidence of the instances appearing in the record are, however, most convincing that the activities of the representatives of the respondents cover the entire state of Texas and that these representatives secured the active assistance of many retailers, induced by an *additional profit of $2 per cask* in their own and their principal's endeavor to have the product of the "Magnolia" Brewery palmed off and substituted for Schlitz beer.

(b) *Respondent's new label and "dress" of package may possibly deceive the careless or illiterate purchaser and thereby invade petitioner's good will; will probably deceive the careless or illiterate purchaser and thereby invade petitioner's good will. As a matter of fact, respondent's new label and "dress" not only deceives customers of the petitioner but causes confusion in the retail trade.*

THERE NEED BE NO EVIDENCE OF ACTUAL DECEPTION.

Petitioner is entitled to the relief prayed for without proof of actual deception.

Why did respondent adopt the label and package complained of when its brewery is known as the "Magnolia" Brewery, and its beer known as "Magnolia Beer?" After its business rela-

tions with the petitioner severed, why did it adopt a package so cleverly simulating the petitioner's in all its salient features?

However, the vital question for this court to decide is whether the careless and ignorant purchaser of Schlitz beer, be he of Texas or of Mexico, might be deceived into purchasing the beer of the respondent as and for the beer of the Schlitz Brwing Company. Being mindful of the character and class of persons purchasing bottled beer and the circumstances under which such bottled beer is sold, *can this court of conscience say that there is no probability or possibility of confusion?*

Courts, generally, do not require evidence of actual deception. They decide cases similar to the instant case after an inspection of the trademarks, labels and other indicia. This rule of equity has been previously referred to in this brief. The manifest improbability of producing evidence of actual deception is the reason for the rule. In the case before this court the very nature of the business and the manner of selling beer in bottles makes the production of evidence of actual deception of consumer almost impossible. If deception is complete, the consumer is not aware of it. The instrument of fraud, the peculiar package by which he was deceived, that is, the bottle bearing the infringing mark and label, is retained by the deceiver.

If the deception is intentional, the knave who perpetrates it is not likely to disclose his guilt.

If the deception is accidental, any knowledge which may come to the petitioner is equally accidental, because the means of communication between the consumer and dispenser, and the manufacturer, is usually very remote. The witness Bielfeld, on behalf of the petitioner, testified that the beer of the Schlitz Brewing Company is distributed through some fifty wholesalers, and then, through them, to hundreds of retailers in the state of Texas.

In a famous English case the court says:

> "If one case of actual deception is proved, there is no more to be said on either side. The case is at an end."

That was an action involving a package of "Liebig's Extract of Meat" where the small jar or container, when purchased, is taken into the possession of the consumer and is taken to his home. The article itself is slowly consumed and frequent opportunity of seeing and examining the label is afforded. (*Liebig's etc. Co. vs. Chemists etc.,* supra.)

In the Club Soda case (*Cochrane vs. MacNish,* supra) to which we have already directed this court's attention, the judicial knowledge which the English courts take of the method of dispensing soda and soda and whiskey and the lack of opportunity of examining the label is disclosed.

In our own country, in the Appellate Court of the Ninth Federal Circuit, the *Kostering case,* supra, shows that the courts in this country take judicial cognizance of the manner in which beer in bottles is sold.

The difficulty attending the production of instances of actual deception was probably never more definitely recognized than in the case of *Von Mumm vs. Frash,* 56 Fed. 830. This was a case involving unfair competition in the sale of champagne, an article more expensive, and consumed by purchasers of a higher degree of intelligence and discrimination, than beer. The court there said:

> "Such testimony is unnecessary, where, as here, the proofs wherein the conclusion that the only reason for the dress adopted by the defendants for their product is that it may be successful to defraud the ultimate purchaser. Moreover, it is not to be disputed that the danger of injury to the complainants is creative by the defendant's method of dressing up their articles, and *the danger* of injury is sufficient ground for the interposition of a court of equity."

Thousands of customers of the Schlitz Brewing Company may have drank "Southern Select" for "Schlitz" without noticing the difference in the labels and without knowing that they

have been deceived. The witness *Selvage* puts the matter concretely when, answering a question whether he had been deceived by the *new* label of the defendant brewery: "I could not tell whether I have or not. I do not know." How could he know, unless he discovered the fraud at the time that he was drinking the beer?

The courts of this country and England have never called for proof of actual deception, except in cases of doubt where the respondent in simulating the petitioner's package or the possible consequences of such simulation was not clear. We still believe that, under the facts presented by the petitioner's bill and its affidavits, no proof of actual deception on this case was necessary to warrant this court affording the relief prayed for in the petitioner's bill.

But, to quote Judge Lacombe:

> "We are not left to inferences, however, to determine whether that purpose has been accomplished. In many cases, where simulation is plain, injunctions have been issued without proof of specific instances of deception. Such evidence, however, is always competent, and often illuminative."

PETITIONER PRODUCED INSTANCES OF ACTUAL DECEPTION.

We accepted the burden placed upon us by the trial court and have proven not only actual instances of deception, but an absolute certainty of the possibility of deception. The evidence adduced upon the hearing will be considered under the following heads:

(1) Instances of deception of the consumer.

(2) Instances of confusion by persons familiar with and skilled in the handling of bottled beer, notwithstanding their experience.

(3) Instances where representatives of the respondent endeavored to induce retailers to purchase defendant's product

for the reason that it might be easily substituted for the product of petitioner.

The evidence offered, bearing upon the use of the infringing label and package as a means of palming off the respondent's product for the petitioner's by unscrupulous dealers, has been heretofore discussed under the head of "substitution" and further reference to it will not now be made, except to repeat the charge that respondent by the use of the simulative label upon its bottled beer put into the hands of retailers the means of intentionally or accidentally palming off its goods for the goods of petitioner; that respondent put into the hands of unconscionable dealers an "instrument of fraud."

INSTANCES OF CONFUSION AND DECEPTION.

We deem a thorough and painstaking analysis of the testimony given by the various witnesses of the complainant and respondent unnecessary. The court will undoubtedly apply the law after reading all the testimony given at the hearing and the depositions offered, a transcript of which will be filed with this brief. Counsel for petitioner, however, believe that a cursory view of the testimony may assist the court.

Clarence Selvage, a commercial traveler, calling upon the saloon and bar trade to sell a brand of whiskey, and familiar with the package of Schlitz export beer, was deceived by respondent's package and did not discover the deception until the bartender called his attention to it. (Tr. pp. 61, 62.)

McIntyre, a fisherman and engineer of Brownsville, Texas, testified that he was deceived by a package of respondent's product in Bird's saloon in Brownsville, Texas (Trans. pp. 66, 67). He is corroborated by the witness *Williamson* (Trans. pp. 64.)

Taylor, a drug clerk employed at Anderson's Pharmacy in the Carter Building, believed he was drinking Schlitz beer until he noticed the difference in the taste. He proceeded to investi-

gate and discovered that he had been served with Southern Select with a brown label. (Trans. pp. 77, 78.) He is corroborate by *Barringer,* who claims to have served many others with Southern Select beer for Schlitz. (Trans. pp. 68, 69.)

Taylor also testified to another instance when he was served with Houston Ice & Brewing Company's beer for Schlitz and did not discover the substitution until he tasted the product and examined the label. (Trans. pp. 77, 78.)

W. F. Blum testified that he knew positively that Southern Select beer, bottled by the Houston Ice & Brewing Company in a brown bottle, having a brown label, has been sold as and for Schlitz beer in Temple, Texas (Trans. p. 58), and at the Liquor Dealers' Convention in Galveston, Texas, in the spring of 1914. (Trans. p. 75.)

Anderson, manager of the Brazos Hotel in Houston, Texas, was accustomed to calling for Southern Select beer put up by the Houston Ice & Brewing Company. When the beer of the respondent in its new "dress" was first brought to his attention he was deceived. He testified as follows: (Trans. p. 79.)

> "The first time I ever saw the new bottle of the Houston Ice & Brewing Company, I think was at the McAtee Bar. I ordered a bottle of Southern Select beer and I was served a bottle of beer and I thought it was Schlitz, and I called the bartender's attention to it and he says that is Southern Select and then I examined it. * * * I said you made a mistake, you served me Schlitz beer and I called for Southern Select.
>
> I had to read the label in order to tell the difference."

Anderson does not keep "Southern Select" in brown bottles bearing brown labels in the Brazos Hotel.

John T. Booth, of Beaumont, Texas, testified that he was in Lang's Oyster House in the city of Houston in the company of two representatives of petitioner and that he was served with Southern Select beer in brown bottles with brown labels, when Schlitz had been ordered, and that he did not detect the difference until his attention was called to it. (Trans. pp. 80, 81.)

Another instance of deception was furnished by *John Henicker* of Humble, Texas, who is engaged in the saloon business and sells the beer of the defendant in brown bottles with a light brown label. He testified that on one or two occasions customers had complained to him that they had been served Southern Select beer and thought they had been drinking Schlitz. Henicker, among other things, testified as follows: (Trans. p. 91.)

> "There was one man in particular, who is a man by the name of Hill, was putting in some machinery there for Mr. Bender and he was there four or five weeks a year or a year and a half ago possibly, and he came in and called for a bottle of beer and I gave him a bottle of Southern Select and he had been there three or four weeks and one day at dinner time he came over and got a bottle of beer and I thought he wanted that all the time, and one day he happened to read the label on the bottle and he said, 'I thought you knew what I drank,' that he wanted Schlitz, and I explained to him that I had not handled Schlitz for two or three years. And he said 'I know different' and he got mad and left and I told him there was no Schlitz in town and we had not handled Schlitz for a number of years and that I did not misrepresent anything. I thought that was what he wanted."

On cross examination he testified: (Trans. p. 92.)

> "I did not misrepresent anything. He liked the beer, but he had it in his head he was drinking Schlitz all the time and he happened to read the label that one particular time and jacked me up about it. * * * This customer he really thought that he was drinking Schlitz when he was drinking Southern Select."

In addition to the instances disclosed in the testimony of purchasers who were actually deceived by the simulation of its label, petitioner was able to find a number of witnesses who testified to the intentional palming off of the goods of the respondent for the goods of petitioner. This is what usually happens upon simulation of a label or "dress" of package.

The price at which dealers purchase the respondent's goods is considerably less than what they have to pay for petitioner's goods.

The retailer is usually wittingly or unwittingly a party to the fraud that is perpetrated by the use of the simulated label.

And probably in no case is it intended by the manufacturer who uses a false label to deceive the retailers of the product.

In the case of *National Biscuit Co. vs. Baker,* 95 Fed. 135, Judge Lacombe says:

> "Defendants present the usual voluminous bundle of affidavits by persons in the trade to the effect that in their opinion no one is likely to mistake defendant's biscuits for complainant's. As has been often pointed out before, IT MAKES NO DIFFERENCE THAT DEALERS IN THE ARTICLE ARE NOT DECEIVED. No one expects that they will be."

In *Von Mumm vs. Frash,* 56 Fed. 830, the defendants argued that they were guiltless because they had never stated anything but the truth in regard to their manufacture. The court characterized what they did thus:

> "They make and put in the hands of other persons, the means of fraud, knowing that these means can be, and probably will be, employed for the purpose of fraud, or to the injury of complainants. The defendants make and sell, knowingly, the tools for fraud; and they, and the knaves who buy the tools of them, intending to use them for the fraudulent purpose for which they are constructed, are coconspirators, each guilty of the fraud perpetrated in pursuance of the intention with which the tools were made, and this, although the particular person intended to be defrauded is not agreed upon between them."

In *Enoch Morgan Sons vs. Whittier,* 118 Fed. 657, Justice Morrow says:

> "In the present case the evidence shows that the goods of the defendant have been mistaken by purchasers for those of the complainant, probably by design of the dealer. And though there is no evidence connecting such dishonest

dealing with the defendant in any way, the fact that it so dresses its goods as to give an easy opportunity to the unscrupulous dealer, to delude the consuming purchaser is very persuasive evidence that intention existed to enter into competition with the manufacturer whose goods were already well established and to carry on such competition in a manner which courts of equity hold to be unfair."

In the case of *Fox vs. Glynn,* 191 Mass. 344, the court says:

"It is not true that wholesale dealers can defend on the ground that they do not mislead or intend to mislead the retail dealers to whom they sell. It is enough to require an injunction if they knowingly place an instrument of fraud in the hands of a retailer with which he may deceive the public."

See also *New England A. Etc. Co. vs. Marlborough,* 168 Mass. 154.

In *Garret vs. Garret,* 78 Fed. 472, the imitative labels were put upon goods which were sold to retailers at reduced prices.

In *Hostetter vs. Becker,* 73 Fed. 297, Justice Cox says:

"Of course, the buyers of defendant's bitters were not deceived. It is not pretended that they were, and that is not the theory of the bill as I understand it. But the defendant placed in the hands of the buyers implements which enabled them to deceive the general public."

In *Amoskeag vs. Trainor,* 101 U. S. 51, p. 63, the court says: "neither will the complainant be deprived of its remedy in equity, even if it be shown by the respondent that all the persons who bought goods from him bearing the trademark of the real owner were well aware that they were not of the complainant's manufacture. If the goods were so supplied by the wrongdoer for the purpose of being resold in the market, the injury to the complainant is sufficient to entitle him to relief in equity."

In the recent case of *Coca-Cola vs. Gayola,* 200 Fed. 720.

Wolf Bros. vs. Hamilton, 206 Fed. 611;

Gulden vs. Chance, 182 Fed. 303;

Gaines vs. Turner, 204 Fed. 553;
DeVoe vs. Wolff, 206 Fed. 420; *United Drug Co. vs. Restanus,* 206 Fed. 570, the same rule is applied.

The courts proceed upon the theory that the retailer will not be deceived. They infer that the unscrupulous retailer will be a co-conspirator in the fraud. It is not intended that the retailer shall be deceived.

But we have a case the like of which we have, as yet, not been able to find in the law books. In this case a situation is presented of which there is no parallel in any of the reports. The retailers of the respondent's beer put up in the brown bottle with brown label and other insignia thereon, have been misled and deceived by the similitude of the label of petitioner into mistaking the respondent's product for the petitioner's and *vice versa,* and have dispensed the product of one for the other by reason of such confusion.

CONFUSION AND DECEPTION OF RETAILERS AND OTHERS FAMILIAR WITH THE HANDLING OF BEER IN BOTTLES.

We will briefly discuss the instances of persons skilled in handling beer in bottles who have confused the packages of petitioner and respondent, and the petitioner's good will has been injured by honest bartenders unintentionally selling the defendant's product for that of the petitioner.

Aside from the many instances of deception practiced by retailers upon the public, as related by the following witnesses, *Peter Breit,* whose depositon was introduced in evidence, *George Barringer,* the young man employed at the Bender Hotel, and *Westley Johnson,* the porter, *John Nelson* of Temple, and *C. L. Fischer* of Beaumont, all of whom testified to deliberate substitution of Southern Select beer in brown bottles with the brown label for the product of the petitioner, and that they were

able to "get away with it," there is the testimony of honest retailers who confused petitioner's and respondent's beer because of their similarity.

Mr. Callaghan related to the court the instance of the porter on the Chamber of Commerce special train out of Beaumont, Texas, serving a large number of people with Southern Select believing it to be Schlitz beer until the error was discovered and a cask of Schlitz beer was opened. (Trans. p. 79.)

Mr. Selvage might be classed at least as a man familiar with the different brands of beer and whiskey because his business kept him constantly in touch with saloonkeepers and bar proprietors. But we have treated him as an ordinary intelligent purchaser before the bar. (Trans. p. 61.)

Mr. Buesing of San Bonita testified that he had observed his bartender two or three times a week, even though he had "gotten after him strong" unintentionally offering Southern Select beer for Schlitz and had told him not to make such mistakes. (Trans. p. 60.)

Another instance is related by John Nelson, the colored porter from Temple, Texas, who testifies that he sometimes grabbed down in the ice box and gave customers Southern Select by mistake—"Because they (the packages of petitioner and respondent) looked just alike and I cannot tell the difference in a rush." (Trans. p. 74.)

On cross examination he testified:

> "you would have to look very closely to tell whether it was Schlitz or Southern Select. You get in a hurry to get it up there and in a rush the ordinary customer he could not tell this unless he looked at the label. * * *
>
> He could not read it and *then* tell the difference. That is the only way to tell them, is to read what is on it. Some can't read, then they don't know what they are getting. * * *
>
> Don't know whether they are getting Southern Select or Schlitz, both labels are the same."

The witness *Tomlinson*, on cross examination, testified that

he had difficulty in telling Southern Select from Schlitz under circumstances like this: (Trans. p. 81.)

> "Well, you would have to look in the ice box where you put it in the ice box. You would have to look at it and notice it. If you did not you took up Southern Select for Schlitz. My clerk did that two or three times,—took up Southern Select for Schlitz. He did not discover it until I told him. * * * My clerk is a white man."
>
> I had no difficulty in distinguishing it myself except in the ice box.
>
> I would turn it over and see whether it was Southern Select or Schlitz."

The respondent's witness Schark testified that when he first started to use Southern Select beer in brown bottles he kept the bottled beer separate and cautioned his bartender not to make any mistake.

VIII.

SUBSTITUTION AS DIFFERENTIATED FROM INFRINGEMENT OF A MARK AND SIMULATION OF "DRESS."

The property right of a trader or manufacturer in his business or good will may be unlawfully invaded in two different ways.

First: When a trader or manufacturer adopts marks or "dress" or other indicia similar to those of another trader or manufacturer that some of the latter's customers are misled or likely to be misled thereby.

Second: When a trader or manufacturer has adopted marks or "dress" or other indicia which differ so grossly from the marks or "dress" or indicia of another trader or manufacturer "that no sensible man, acting on the instant, would be deceived," but sells his goods or wares as and for the goods and wares

of the original manufacturer by some trick or artifice or by misrepresentation amounting to fraud.

The latter is a simple case of substitution and involves no question of trademark rights or simulation of dress or other indicia.

The trial court in the questions directed by it to the witness Barringer and others clearly brings out the distinction between substitution induced by artifice or fraudulent misrepresentation on the part of a retailer induced and made possible by a simulated mark or package.

The witness *Barringer* testifies as follows (Trans. p. 70):

"By the Court:

Q. Suppose a customer came in and asked for a bottle of Budweiser and you did not have anything but Schlitz?

A. I would have to tell him I did not have any Budweiser.

Q. Why would you tell him that?

A. *You cannot very well fool them on that.*

Q. Suppose he came in and asked for Southern Select and you did not have anything but Schlitz, what would you do?

A. *I guess I would try to fool them.*"

The witness *Westley Johnson* testified as follows (Trans. p. 72):

"By the Court:

Q. What beer do you carry?

A. Budweiser, Select, Blue Ribbon, Pabst, Schlitz, Falstaff and Cook's.

Q. Suppose a man came and asked for any one of the beers and you did not have anything but Schlitz, what would you do?

A. If he came in and asked for a bottle of Budweiser and we did not have anything but Schlitz I would tell him we did not have any Budweiser.

Q. Suppose a man came in and asked for Schlitz and you did not have Schlitz, what would you do?

A. If a man came in and asked for a bottle of Schlitz

and we did not have any Schlitz, and we had Southern Select, we would give him a bottle of Southern Select and take chances on getting by with it.

Sometimes men come into the Bender bar who are so drunk that they paid no attention, and if they asked for a bottle of Schlitz we could give him a bottle of Southern Select or anything. There was no trouble in imposing on a drunken man."

The witness *Fischer,* who had testified that he did not handle Schlitz, but substituted Southern Select for Schlitz, on cross examination by defendant's counsel, testified as follows (Trans. pp. 76, 77):

"Q. If a man asked for a bottle of Budweiser, what would you give him?

A. I would give him Budweiser.

Q. If he asked for any beer that you did not handle, what would you give him?

A. Well, I would tell him I did not have it.

Q. Suppose he asked for a bottle of Blue Ribbon beer and you were not handling that kind, did you let him go out and miss the sale, or did you give him beer that you had that was equally as good?

A. No, sir. I would tell him I did not have it, because *Blue Ribbon and all other beer is put up in different packages.*"

Immediately preceding this cross examination by defendant's counsel, the witness had testified as follows (Trans. p. 76, just before the above quotation):

"Q. What has been the custom in your place of business, while you were running a saloon, when a man came in the saloon and asked for a bottle of Schlitz, what was he served with?

A. I gave him Southern Select.

Q. Did you have that continuously?

A. I have done it ever since I have been in business.

Q. Were you able to sell Southern Select beer put up in brown bottles with a brown label successfully for Schlitz beer?

A. Well, I got by pretty regularly with it, once in a while some one mentioned it.

Q. In serving beer, when a man comes in and calls for a bottle of beer, how do you serve it to him, would you pour it out or not?

A. Yes, pour it out and set it on the counter and let him pour the second glass himself."

The witness *Guse* testified (Trans. p. 82):

"Since the Houston Ice & Brewing Company has been selling their Southern Selcet in brown bottles, with the brown labels, I have seen it confused at the Rice bar in Houston, Texas. This was in November, a year ago, during the Houston carnival. I saw two gentlemen walk up and ask for two bottles of Schlitz beer, and the bartender reached down and got two bottles of Southern Select, and as he took the bottles up he rubbed the labels off, and I am positive they were Southern Select. I know it when I see it."

The witness *Craeger,* a traveling representative of the defendant, testified as follows in relation to *substitution* (Trans. bottom of page 105):

"Q. And you say you do not know of any instance where Southern Select has been substituted for Schlitz where the purchaser was ignorant of the substitution?

A. Well, it is very easy to substitute. You take in southwest Texas where black bottles—I have walked in and called for Southern Select and I have seen Schlitz and I have seen Cook's Pearl. I called for Southern Select and they would not have a bottle of Southern Select in the icebox.

Q. I am talking about where the purchaser has been deceived.

A. No, sir.

Q. In the territory you speak of you say that it is the practice that if they have not the beer called for they give you some other beer?

A. They would give you a black bottle of beer if they have got it, and if they have not they give you a white bottle. *But that is easily detected by me because I usually notice what they sell.*"

The testimony given by the witnesses, just quoted, all tends

to establish the difference between substitution in its strict literal sense and substitution by reason of "an instrument of fraud" placed in the hands of the retailer.

Hopkins in his work on Trademarks (2nd Ed.), Section 115, page 276, says:

> "By 'substitution' as used here is meant the substitution by a retail merchant of goods other than those called for by the purchaser. *In its narrower sense it is confined to the retail merchant who commits the offense. In its broader sense it includes the manufacturer of the substituted goods, in cases where he has so prepared the goods as to make the substitution possible.*"

In a case of substitution in its narrower sense, the retailer alone is liable. In its broader sense the manufacturer and retailer are liable, and the aggrieved party whose good will and business has been invaded may prosecute his remedy against either one or both.

The incident testified to by witness *Guse*, where Southern Select beer was served in bottles with labels removed, when Schlitz beer had been called for, was undoubtedly a case of substitution, unless opportunity had been given the purchaser to get a view of the picture which the original package presented to the eye. If the customers had no opportunity of glancing at the package in advance, the act of the retail dealer in removing the labels was an act of fraud for which he alone would be responsible.

Had the witnesses *Barringer, Westley Johnson* or *Fischer* sold Budweiser or Blue Ribbon beer when Schlitz beer was called for, their offense would have been a simple case of fraud and substitution, and they and they alone and not the rival brewery would have been chargeable with the fraud; and for the reason that the difference in "dress" between the bottled product of the Schlitz Brewing Company and the bottled product of the Anheuser-Busch Brewing Company and the Pabst Brewing Company is so "GROSS *that no sensible man, acting on the instant, would be deceived.*"

One of the earliest cases in this country which passed upon the above principle is *Morgan Sons Co. vs. Wendover,* 43 Fed. 420. Petitioners in this case were the manufacturers of scouring soap known as "Sapolio." Defendants were dealers who, when "Sapolio" was asked for, delivered "Pride of the Kitchen," a similar article, *but which was distinctly different in its appearance.* The evidence was that the defendant's clerks, when "Sapolio" was asked for, handed out "Pride of the Kitchen" *without comment or explanation.*

Judge Green in his opinion says:

> "Now, what did the transaction in the store of the defendants, as disclosed in the proofs, amount to? Simply this: When asked by the complainant's agent for a cake of 'Sapolio' the defendant's agent in response delivered a cake of 'Pride of the Kitchen,' which in effect was an assertion that the cake delivered was 'Sapolio,' the very identical soap which had been asked for. In other words, the act of the defendant's salesman was a sale of soap not made by the complainant as and for the soap of the complainant known as 'Sapolio' and thereby constituted an assertion on his part that it was 'Sapolio.' * * * That the act of the salesman in offering 'Pride of the Kitchen' in response to a demand for 'Sapolio' is, *though done silently, a positive,* unlawful act, is clear. Its unlawfulness consists in an attempt to steal away THE BUSINESS *of the complainant for the benefit of the manufacturers of 'Pride of the Kitchen.'*"

Had *Barringer, Johnson, Fischer,* or any one else sold Budweiser or Blue Ribbon or Southern Select *in white bottles bear in white labels,* when Schlitz beer was called for, no matter whether the sale was made without comment or explanation, through oral misrepresentation or trick, or by reason of the fact that the purchaser was unfamiliar with the "dress" of the Schlitz product or was drunk, the fraud would have been the fraud of the party making the sale and would not have been the fraud of the manufacturer of the article.

As Judge Knappen well says in *Rathbone vs. Champion,* 189 Fed. 26:

"But defendant is not responsible for the fact that tricky retailers represent its manufacture as that of the complainant, knowing better, *provided defendant has done its legal duty in distinguishing its own product from that of the complainant.*"

The indisputable fact, however, remains in this case that the witnesses Barringer and Johnson, who were examined by the court, and the witness Fischer, examined by counsel for the defendant, did not attempt any independent fraud of their own EXCEPT AS IT WAS INDUCED BY THE CLOSE SIMILARITY EXISTING BETWEEN THE PACKAGES OF THE PETITIONER AND DEFENDANT. THE ONLY BEER THEY ATTEMPTED TO SUBSTITUTE FOR SCHLITZ WAS THE BEER OF THE HOUSTON ICE & BREWING COMPANY CONTAINED IN BROWN BOTTLES BEARING BROWN LABELS WITH ORNAMENTAL WHITE SCRIPT AND OTHER INDICIA (THE LATTER NEED NOT HERE BE DESCRIBED).

In selling Southern Select for Schlitz they substituted to the eye of the purchaser a picture with which he thought himself familiar and which he thought he would easily recognize AT A GLANCE.

IX.

CONCLUSION.

Petitioner has sought to establish a good will of its own.

More than twenty years ago it adopted a label to maintain and extend that good will.

Ninety per cent of its beer in bottles sold in commerce between the states and in foreign countries was known as "Export" upon which was pasted a label of light brown body color with white characteristic script and block lettering on the face of it and a blue figure at the left hand side.

The label was unique.

For more than twenty years petitioner had jealously guarded this trade mark label and its property right therein.

About ten years ago respondent was one of the petitioner's agents in the state of Texas, and sold its beer in brown bottles labeled with the export label, the subject of this suit, to numerous customers in Texas and Louisiana.

Seven years ago respondent ceased to be such agent of the petitioner, and one year later it put upon *its* beer in brown bottles a light brown body colored label, of different shape and size than petitioner's, but with the letterpress in style and color similar and a blue figure on the left hand side of a field of light brown, the collocation of elements and colors previously exclusively used by the petitioner in marketing its beer in brown bottles.

It would seem apparent that upon inspection of this label of respondent, the lower court should have granted the petitioner the relief prayed for in the bill of complaint. From the testimony adduced at the hearing and reviewed before the Court of Appeals there should have been no doubt that the respondent by the adoption of the label, Exhibit "C," to the bill of complaint, and the subsequent modifications of such label retaining the color and general arrangement of elements, suggestive of the petitioner's collocation and "dress" of package, *had* invaded the petitioner's property right in its good will and that the adoption of such brown label with the lettering in style and color and the blue figure, had infringed the trade mark label exclusively used by the petitioner for upwards of twenty years.

In conclusion we submit it to be apparent from the record and the exhibits that respondents, petitioner's former agents and subsequent competitors, being familiar with the extent and character of petitioner's trade in Texas, Louisiana and Mexico, deliberately undertook to devise a label which, when used on a brown bottle, could be readily confused with petitioner's label,

as the testimony shows beyond dispute was in fact done, to the end that petitioner's good will has suffered in no small degree; that the judgment under review is erroneous, and that petitioner is entitled to the injunction and relief prayed for in its complaint.

Respectfully submitted,

RUSSEL JACKSON,
J. W. McMILLAN,
Solicitors for Petitioner.

IN THE

SUPREME COURT

OF THE UNITED STATES

JOSEPH BOSBYSHELL BROKERAGE COMPANY,
Petitioner,

vs.

ROCKWELL IRON & BRASSWORK COMPANY
OF ALA.,
Respondents.

BRIEF AND ARGUMENT FOR RESPONDENT

—By—

H. M. Garrison,
Jesse Armistead,
Warren H. Walton,
Solicitors for Respondents.

Rabb, Bowie, Parker & Garrison,
Of Counsel.

Gibbs, Walker & Co., Printers, Atlanta, Ga.

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American Tobacco Co. v. Globe Tobacco Co., 193 Fed., 1015 18-87

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Brown et al. v. Seidel et al., 153 Pa. St., 60 102

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Coats v. Merrick Thread Co., 149 U. S., 565 18-90

Coca-Cola Co. v. Glee-Nol Bottling Co., 221 Fed., 61 55

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IN THE

SUPREME COURT

OF THE UNITED STATES

JOSEPH SCHLITZ BREWING COMPANY,
Petitioner,

vs.

HOUSTON ICE & BREWING COMPANY ET AL.,
Respondents.

No. 326

BRIEF AND ARGUMENT FOR RESPONDENT

I. STATEMENT OF THE CASE.

1. The Question Presented.

This cause presents the question whether the use by the Houston Ice & Brewing Association on brown bottles (pint size) containing beer manufactured by it, of this label,

(Defendant's Exhibit L, Tr., 146):

CONTENTS { LARGE 24 OZ / SMALL 12 OZ
ALCOHOL LESS THAN 4 %
Southern Select
BEER
BREWED AND BOTTLED BY
HOUSTON ICE & BREWING ASSN.
HOUSTON, TEXAS

with this as the corresponding neck label,

(Denfendant's Exhibit M, Tr., 146):

constitutes unfair competition as to the Joseph Schlitz Brewing Company, which uses on brown bottles (pint size) containing beer manufactured by it, this label,

(Complainant's Exhibit B, Tr., 21):

with this neck label,

(Defendant's Exhibit BB, Tr., 147):

(Note: At the time the suit was filed, petitioner was using the neck label shown on page 21 of the Transcript, Exhibit "D." The neck label shown above was adopted by it after the suit was filed.)

Petitioner claimed that it did, and on June 10, 1914, presented to the United States District Court for the Southern District of Texas, at Galveston, and urged, an application for a temporary injunction restraining the Houston Ice & Brewing Company, the predecessor in title of the Houston Ice & Brewing Association, from using a label practically the same as the one just shown. The Hon. Waller T. Burns, as the judge of the court to whom the application was presented, after consideration of the same, found that the use of the label did not constitute unfair competition and refused a temporary injunction.

The case came on for trial at Houston on March 27, 1915. There was a full hearing, both by oral testimony and depositions, the trial lasting more than a week, and the court again decided that there was no infringement of any rights of petitioner by the use by the Houston Ice & Brewing Association of the label above shown, and dismissed the bill.

Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment of the lower court was affirmed. (For opinion see Tr., 179, 185.)

2. The Good Will of the Houston Ice & Brewing Association.

There are parties to this record who are no longer interested in the subject-matter. We refer to the Houston Ice & Brewing Company (which appears in the style of

the case) and to the officers and last board of directors of that company. The party in interest as respondent is the Houston Ice & Brewing Association, and it only.

The Houston Ice & Brewing Association is the name under which seven individuals as trustees under a voluntary declaration of trust dated October 20, 1914, hold and at the time this suit was filed owned, and operated, a brewery in the City of Houston. This association was organized for the purpose of purchasing, owning and operating all of the property of the Houston Ice & Brewing Company, a corporation, and on October 21, 1914, it did purchase all of the property of that company of every kind whatsoever, and the Houston Ice & Brewing Company thereupon retired from business and distributed its assets among its stockholders.

The Houston Ice & Brewing Company was itself the successor of another corporation of that name, which was organized under the laws of Texas in the latter days of 1892. The first Houston Ice & Brewing Company continued in business until December 31, 1901, when it was succeeded by the company of that name first mentioned. The stockholders of the first Houston Ice & Brewing Company and of the second Houston Ice & Brewing Company, and the beneficial owners of the property of the Houston Ice & Brewing Association have been substantially the same, so that there has been, practically speaking, continuous ownership by the brewery in Houston from 1892 up to the present time.

In 1893, the first year after it was organized, the Houston Ice & Brewing Company brewed 25,738 barrels of beer, including keg and bottle beer, and in 1914 the Houston Ice & Brewing Company and the Houston Ice & Brew-

ing Association together (the Houston Ice & Brewing Association having taken over the property and begun business October 21, of that year) brewed 178,000 barrels, including both keg and bottle beer, or the equivalent of over 53,000,000 bottles. (Tr., 141.) The Houston Ice & Brewing Company and the Houston Ice & Brewing Association actually bottled and sold in the ten years next preceding the year in which the case was tried, over 62,000,000 bottles of beer. (Tr., 142-143.) The receipts from beer sold in 1893 were $213,391.58; from beer sold in 1914 were $1,762,570.04, and the total receipts from beer sold since the begining of the brewery in 1893 were, on December 31, 1914, $19,504,599.39. (Tr., 143.)

Respondents have endeavored always to manufacture beer of the highest quality. They have spared no expense to accomplish this. They have endeavored to employ the most skilled workmen, to obtain the highest grade of materials, and to install the best equipment that could be obtained. (Tr., 109.) The unit in selling bottled beer is a cask of ten dozen pints. They have received on an average of $9.00 a cask for their beer *delivered,* and the Joseph Schlitz Brewing Company has received on an average of $9.75 a cask for its beer *delivered.* (Tr. 110.) They have received more for their beer than petitioner has for its beer.

3. The Manner in Which the Texas Breweries Obtain Their Supply of Bottles.

There are seven breweries in Texas, and the practice of each with reference to obtaining its supply of bottles is the same. They do not buy new bottles. They depend for their supply on bottles that have been used. When

beer in bottles is sold, it is not the understanding that the bottles will be returned. In other words, they become the property of the purchaser. The Texas breweries pay twenty-five cents per dozen for empty bottles. This is as much as the breweries who ship them into Texas pay for them new. (Tr., 108.) In consequence but a small part of the bottles shipped into Texas are returned. (E. L. Bielfield, sales manager for petitioner, estimated the number of their bottles returned at fifty per cent. (Tr., 49.) In this way the Texas brewers are amply supplied.

Beer bottles are, and have been during the life of the Houston Ice & Brewing Company, of two kinds—a light or green bottle, and a dark or brown bottle. Prior to 1911 the Joseph Schlitz Brewing Company shipped both light and brown bottles into Texas. (Tr., 50.) The Anheuser Busch Brewing Company and the Pabst Brewing Company shipped into Texas light bottles only. By far the greater number of bottles at this time were light bottles.

4. The Label Used by the Houston Ice & Brewing Company Prior to the Increase in Use of the Brown Bottle.

In the beginning of its business in 1892 or 1893 the Houston Ice & Brewing Company adopted the name "Southern Select" for its bottled beer. It has had other bottled beer from time to time, but Southern Select has at all times constituted at least half of its output of bottled beer. At the time of the trial it constituted about sixty-five per cent. of such output. (Tr., 108.) Prior to 1911 it was put up in the light colored bottles referred to, and bore this label and neck label,

(Defendant's Exhibit "D," Tr., 145):

The Houston Ice & Brewing Association continued to put up Southern Select beer in light bottles until prohibition became effective in Texas, June 25, 1918. In the twelve months preceding the trial, approximately fifteen per cent. of the total output of Southern Select beer was put up in light bottles. Where light bottles were used the white label was used. (Tr., 108.)

5. Increase in the Number of Brown Bottles Used.

In 1911 the Joseph Schlitz Brewing Company began to advertise widely and extensively that the brown bottle was better adapted as a container for beer than the light bottle. Mr. Bielfield, the sales manager of petitioner, testified: "Since 1911, we have advertised that the brown bottle is better adapted to beer than the light bottle." (Tr., 50.) Mr. Autrey, the Vice-President of the Houston Ice & Brewing Company, testified: "I think the bottle (brown bottle) protects the beer better than the light colored bottle, and insures its stability and color"; and that for this reason he preferred to use the brown bottle. (Tr., 108.) In 1911 the Joseph Schlitz Brewing Company began to confine itself exclusively to the use of brown bottles. This increased the number of such bottles. (Tr., 52, 53.) In a year or two after this—1912 or 1913—the number of brown bottles used by the Houston Ice & Brewing Company had increased. (Tr., 108.) Mr. Bielfield testified that other of the breweries had "switched to the brown bottle since they started their brown bottle campaign." (Tr., 49, 50.)

6. The Custom of the Breweries to Use One Label for One Kind of Bottle, and Another Label for Another Kind of Bottle.

Prior to 1894, when the Joseph Schlitz Brewing Co. adopted the label now in use, it had a special label for beer put up in light bottles. It was a combination of blue and gilt lettering. It never used this label on the brown bottle. For the brown bottle it had a different label. "In other words," says Mr. Bielfield, "prior to 1894 we had one label for the light green bottle, and another label for

the brown bottle." (Tr., 51.) After adopting a different label in 1894 they still followed the practice of having a different label for the light bottles, from that which they used on the dark bottles. For the light bottles they used a label with a gold background; for the brown bottles they used a label with brown background. (Tr., 51.) Mr. Kronshage testified that the label with the solid body coloring of gold was placed upon the light bottle, and the label with the brown body coloring was used on the brown bottle. (Tr., 83.) The Anheuser Busch Company's well known Budweiser is bottled in a white bottle, and has a white label. (Tr., 111.) Mr. Autrey, in connection with his testimony about changing from the light colored bottle to the brown bottle for the reasons which he had given, said also (Tr., 108): "We changed the color of the label with the color of the bottles, because it is an appropriate dress for the bottle, and we wanted to harmonize them." He testified at another place that they still use some white bottles; that approximately fifteen per cent. of Southern Select beer bottled by them "in the last twelve months" has been put up in light bottles, and that on the light bottles they use the white labels and on the brown bottles the brown labels. (Tr., 108.)

In more than one place it has been said by petitioner, or has been left by it to be inferred, that the Houston Ice & Brewing Company's discontinuance of its relations with the Joseph Schlitz Brewing Company as agent or distributor, and its adoption of the brown label, were simultaneous, and were in some way connected with each other. Such is not the fact. The Houston Ice & Brewing Company discontinued business with the petitioner in 1911 or 1912. Mr. Bielfield testified that the last shipment to the

Houston Ice & Brewing Company was made in June, 1912, and consisted of six cars. (Tr., 48.) There is given on page 132 of the Transcript a statement showing the business done by the Houston Ice & Brewing Company with petitioner from the beginning of the business in 1900. It shows six cars shipped in 1912. But when the business done in 1911, as well as that done in 1912, is compared with that done in previous years, it will be seen that the relations were practically terminated in 1910. The Houston Ice & Brewing Company did not begin to use the brown label until *August, 1913.* (Tr., 110.)

Mr. Autrey testified (Tr., 110): "At one time we sold Schlitz beer extensively in Beaumont, Texas. We did not sell it generally. We sold it at Humble and La Porte, and I do not recall any other place except Beaumont. We did not sell it in Houston. It is not true that when we discontinued the sale of Schlitz beer we began the use of brown bottles with brown labels. That had no relation or anything to do with it. We quit handling Schlitz beer long before we thought of putting a brown label on a brown bottle."

7. The Houston Ice & Brewing Company's Advertisement of Its Beer.

In the ten years ending December 21, 1914, the Houston Ice & Brewing Company spent for advertising its beer $124,647.96, or more than $12,000.00 a year on an average. This included newspaper and street car advertising, lithographing, cards, etc. (Tr., 107.) All of the advertising matter called attention prominently to the fact that the beer advertised was made by the Houston Ice & Brewing Company, of Houston, Texas. In addition to the labels,

of all of them, shown, see also respondent's Exhibit N from an advertisement in the Houston Daily Post of March 28, 1915 (Tr., 147); complainant's Exhibit No. 10, consisting of a brown glass sign of respondent; and complainant's Exhibit No. 11, consisting of respondent's page advertisement in the Houston Daily Post of March 24, 1915. (Tr., 139.)

8. Objection from Petitioner to the Use of Respondent's Label.

In the fall of 1913 respondent received a letter from Messrs. Kronshage, Hannan & McMillan, attorneys for the Joseph Schlitz Brewing Company, demanding immediate discontinuance of the use of the label it was then using. (Tr., 22.)

This label is shown in the Transcript of the record of the United States Circuit Court of Appeals in color at page 17 of said transcript, and in the transcript of this court, but not in color, at page 13.

To this letter, the attorneys for respondent replied under date of October 2, 1913, as follows (Tr., 23):

> "Your letter of September 16th to the Houston Ice & Brewing Company was referred to us. The Houston Ice & Brewing Company, as much as the Joseph Schlitz Brewing Company, desires that there should be no room for mistaking the beer of one company for that of the other, and if there is any similarity between the labels which might cause this, it resulted far from any design on the part of the Houston Ice & Brewing Company that this should be the case. It may be that the person designing the label had the Schlitz label before him in designing the letters. As to this we are not informed.
>
> "The size and shape both of the main label and the smaller label used on the bottles respectively

ought to go a long ways in preventing any mistaking one kind of beer for the other. At the same time, the Houston Ice & Brewing Company will change the lettering on its label and will endeavor to see that there is no just cause of complaint on the part of your client.

"Yours very truly,

(Signed) "BAKER, BOTTS, PARKER & GARWOOD."

As a result of this exchange of letters this label was adopted,

(Complainant's Exhibit J, p. 23):

This still did not satisfy petitioner, and an application for a temporary injunction was made.

Before the case was tried on the merits, respondent changed its label in order to have placed thereon certain statements required by the Pure Food Act, and in doing so made a slight change in the letter "S"—to improve the

general appearance of the label. (Tr., 114.) There resulted the label which is first shown in this brief, and upon this the case was tried.

II. BRIEF OF ARGUMENT.

1. No Question of Infringement of Trade Mark Involved.

Petitioner's certificates of registration did not cover color (Tr., 119), and independent of color the symbols and marks on respondent's label bear no resemblance to the symbols and marks registered by petitioner.

2. The Question in the Case Stated.

The question is whether or not the respondent in getting up "the dress" for its package used features of the dress of petitioner's package which belonged exclusively to petitioner; and if so, whether or not as a result of this, such similarity between the two packages exists that ordinary purchasers of beer, giving such attention to the same as such purchasers usually give, will be caused to purchase one, supposing it to be the other.

Payton v. Snelling, 17 R. P. C., 48, 52, quoted in Hopkins on Trade Marks (Third Edition, 1917), Sec. 121.

McLean v. Fleming, 96 U. S., 255, 256.

3. The Right of Respondent to Use the Brown Bottle.

Breweries generally use the same size, shape and color of bottles. The brown bottle used by respondent is the same as the brown bottle used by petitioner, or any other brewery. Petitioner purposely refrains from putting its name on its bottles or using a special size or shape of bottle, so that dealers the country over may find a ready

sale for the empty bottles, and thus pay the price demanded for the beer.

The petitioner's manager testified on this point, as follows:

> "We could prevent the use of a Schlitz bottle by putting our name on it, but we would have no sale of beer then. It would make the beer too expensive in certain sections of the country." (Tr., 50.)

Prior to 1911, when the campaign was inaugurated advocating the brown bottle as a better container for beer because of protection from light, and when brown bottles were not so numerous in Texas, respondent used another kind of bottle, to wit, a light green bottle, and the customary package at that time for its beer was a light green bottle of this kind, with a white label. (Tr., 108.)

When the brown bottles became more numerous, respondent, preferring them because of their advantages as containers of beer, began to use them chiefly. (Tr., 108.) It is the custom of breweries to use one label for one kind of bottle, and another label for another kind of bottle (Tr., 50, 51, 83, 108 and 111); and in 1913, respondent, in adopting the brown bottle as its standard bottle, adopted a brown label to harmonize with it. (Tr., 108.)

4. The Right of Respondent to Use the Brown Color Selected by It for Its Labels.

Color as a feature of dress is of common right, and cannot be exclusively appropriated by anyone. Petitioner cannot monopolize the color common to its and respondent's label.

Fleishmann et al. v. Starkey, 25 Fed., 127.
Newcomer & Lewis v. A. J. Scriven Co., 168 Fed. Rep., 621; 95 C. C. A., 77.

Hopkins on Trade Marks (3rd Edition, 1917), Sec. 114.
Viavi Co. v. Vimedia Co., 245 Fed., 289.
See, also, authorities under 10, *infra*.

5. Not One of the Features Which Specially Distinguish Petitioner's Label Appears on Respondent's Label.

"When, as in this case and in the last, what is called the plaintiffs' get-up consists of two totally different things combined, namely, a get-up common to the trade, and a distinctive feature affixed or added to the common feature, then what you have to consider is not whether the defendants' get-up is like the plaintiffs' as regards the common features, but whether that *which specially distinguishes the plaintiffs' has been taken by the defendants,*" Payton v. Ward, 17 R. P. C., 58 (quoted in Hopkins on Trade Marks (3rd Edition, 1917), Sec. 121).

Many features of one label are radically different from anything on the other.

6. The Features Common to Both Packages do not Constitute a Collocation Which Could Be Said to Specially Distinguish Petitioner's Package or Be Said to Be a Collocation to Which Petitioner has an Exclusive Right.

It is not alone a label of the shape or size of petitioner's, nor such a label with the inscription that this label bears that petitioner desires to protect and monopolize. What it desires is to secure the exclusive right to the use of a *brown label* on a *brown bottle* as a trade mark for the sale of beer.

Viavi Co. v. Vimedia Co., 245 Fed., 289.

7. No Such Similarity Between the Labels as Would Cause an Ordinary Purchaser of Beer, Giving Such Attention to the Same as Such a Purchaser Usually Gives, to Purchase One, Supposing It to Be the Other.

McLean v. Fleming, 96 U. S., 255, 256.
Centaur Co. v. Marshall et al., 97 Fed., 785.
Fiel Co. v. Robbins, 220 Fed., 650.

See authorities under 10, *infra.*

8. Great Weight Should Be Attached to the Conclusions of the Trial Court on the Conflicting Evidence as to Deception.

United States v. United Shoe Machinery Co., 247 U. S., 32, at 41.
DeLaval Sep. Co. v. Iowa Co., 194 Fed., 423.
Tilghman v. Proctor, 125 U. S., 136.
American Rotary Valve Co. v. Moorehead, 226 Fed., 202.

9. An Inspection of the Labels Themselves Leaves Nothing to Be Said to Show There Is No Unfair Competition.

Liebig's Extract of Meat Co. v. Chemist's Co-operative Society, Rep. of Patent, Design and Trade Mark Cases, Vol. 12, 736, 738.
Lorillard v. Pepper, 86 Fed., 956, 960.

See authorities under 10, *infra.*

10. The Authorities Abundantly Support the Position of Respondent of No Unfair Competition.

Howe Scales Co. v. Wycoff, 198 U. S., 140.
Kann v. Diamond Steel Co., 89 Fed., 706.

E. Regensburg & Sons Co. v. Juan F. Portuondo Cigar Mfg. Co., 142 Fed., 160.
P. Lorillard Co. v. Pepper, 86 Fed., 956.
Centaur Company v. Marshall et al., 97 Fed., 785.
American Brewing Co. v. Bienville Brewery, 153 Fed., 615.
Postum Cereal Co., Limited v. American Health Food Co., 119 Fed., 848.
American Tobacco Co. v. Globe Tobacco Co., 193 Fed., 1015.
Newcomer & Lewis v. Scriven Co., 186 Fed., 621.
Coats v. Merrick Thread Co., 149 U. S., 565.
Continental Tobacco Co. v. Larus & Bro., 133 Fed., 727.
United States Tobacco Co. v. McGreenery et al., 144 Fed., 531.
Proctor & Gamble Co. v. Globe Refining Co., 92 Fed., 358.
Philadelphia Novelty Mfg. Co. v. Rouss, 40 Fed., 586.
Fleishmann et al. v. Starkey, 25 Fed., 127.
Coca-Cola Co. v. Glee-Nol Bottling Co., 221 Fed., 61.

11. Conclusion.

III. ARGUMENT.

1. No Question of Infringement of Trade Mark Involved.

Before proceeding to a discussion of the claim of unfair competition made by petitioner, it may be well for purposes of elimination to call attention to the fact that there is no question of infringement of trademark involved. The Federal statute has no application, because none of petitioner's registrations refer to color as an identifying mark. The marks and symbols registered by petitioner are inscriptions used on the label. If any confusion results from the use by petitioner of the labels involved, this comes about, not from anything in respondent's marks similar to those of petitioner, but from the fact that petitioner has used the registered marks and symbols in connection with a thing not registered—that is, the body color of the label itself. If confusion exists, it results from the use by both petitioner and respondent of the brown bottle and brown body color of the label, and not from any similarity between the registered marks.

The certificate showing the first registration of petitioner's trade mark introduced by it in evidence contains the following statement:

> "Said trade mark consists of the word 'Schlitz' in heavy, characteristic, white script. This trade mark has generally been arranged in rhomboid form, as shown in the accompanying fac simile in black and white, in which the word 'Schlitz' apears in charasteristic letters, slanting upward from left to right, in an oblique line, with a globe and belt. The symbols employed as a general trade mark of the complainant for years past have been at immediate left of said word 'Schlitz.' *The color of the background of the trade mark as used with the various brands of bottled*

> *malt liquors varies, and aims to correspond with the color of the beverage, so as to indicate at a glance the brand itself*—for example, the golden background being applied to a light, pale beer, and a dark color to a dark, stout beer, and the light. *The various accessories* which are used as trade marks *may be varied* at pleasure, altogether omitted, or added to, without materially altering the character of the said trade mark, the essential feature of which is the word 'Schlitz,' in heavy, characteristic, white script." (See complainant's Exhibit No. B, Tr., 119.)

By registrations Nos. 87,489 (Tr., 138) and 90,587 (Tr., 118) petitioner registered separately the two principal elements covered by its first registration. In neither of these registrations, however, is there any reference to the body color of the label, nor is there any attempt to acquire an exclusive right to the body color of the label itself.

We do not understand that petitioner contends, and certainly cannot believe that anyone could contend, that the marks and symbols used by respondent on its label resemble the trademark of the petitioner so nearly as to be "likely * * * to be mistaken for it by the public." In other words, if the marks and symbols used on the respondent's labels were in black ink on white paper, no one would contend that the labels so made could be confused by any ordinary person. Even if petitioner had registered a trade mark which consisted of its marks and symbols on a label of a particular shape and color, it would not constitute an infringement of petitioner's trade mark to use the same colored label, provided as in the

case of respondent's labels, the distinguishing features of the two labels otherwise were such that they would not likely be mistaken one for the other.

There is left in the case only the question of unfair competition.

2. The Question in the Case Stated.

The question is whether or not the respondent in getting up "the dress" for its package used features of the dress of petitioner's package which belonged exclusively to petitioner, and if so, whether or not as a result of this, such similarity between the two packages exists that ordinary purchasers of beer, giving such attention to the same as such purchasers usually give, will be caused to purchase one, supposing it to be the other.

"He (the plaintiff) must make out, not that the defendant's are like his by reason of those features which are common to them and other people, but he must make out that the defendant's are like his by reason of something peculiar to him, and by reason of the defendant having adopted some mark, or device, or label, or something of that kind, which distinguishes the plaintiff's from other goods which have, like his, the features common to the trade. Unless the plaintiff can bring his case up to that, he fails." (Payton v. Snelling, 17 R. P. C., 48, 52, quoted in Hopkins on Trade Marks (3rd Ed., 1917), Sec. 121.)

"A court of equity will not interefere when ordinary attention by the purchaser of the article will enable him at once to discriminate the one from the other. Two trade marks are substantially the same in legal contem-

plation if the resemblance is such as to deceive ordinary purchasers, giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one supposing it to be the other." (McLean v. Fleming, 96 U. S., 255, 256.)

3. The Right of the Respondent to Use the Brown Bottle.

The most conspicuous part of the dress of respondent's package is the brown bottle. That respondent has a perfect right to use such a bottle cannot be questioned. In fact it may be unreservedly stated that the use of such bottle by respondent is openly invited by petitioner.

Mr. Bielfield, manager of the bottling department of petitioner, whose testimony has previously been referred to, testified that of the 50,000,000 bottles shipped to Texas in the six years preceding 1912, only about fifty per cent. were returned; that petitioner encouraged the sale of such bottles in such States as Texas; that they could prevent the re-sale of such bottles by having the name of the brewery blown in them, but this they could not afford to do; that unless the dealer in Texas could sell their bottles freely for local use he would not buy their beer; that the beer would be too expensive to the dealer unless he could get the additional revenue arising from the sale of the bottles; and that for this reason they encouraged the sale of the bottles.

The bottle referred to is the same as any other brown bottle, whether used by petitioner or by other breweries. The petitioner buys and uses bottles purchased from all quarters, as does the respondent. In 1914 petitioner used only thirty per cent. new bottles. The remainder of the bottles used by it were bottles which

had been previously used by it or other breweries, the bottles being gathered together indiscriminately.

There will, therefore, as stated, be no question of the right of respondent to use the brown bottle.

4. The Right of Respondent to Use the Brown Color Selected by It.

The next most conspicuous feature of the dress of respondent's package is the color of the label used. That respondent and all the rest of the public have a perfect right to use this color, and that there can be no monopoly of it by petitioner, is equally well settled. The law is well expressed in the opinion of Justice Cole in Fleischmann et al. v. Starkey, 25 Fed., 127:

> "The complainants are the owners of certain trade marks used upon their packages of compressed yeast, and they charge the defendant with an unlawful imitation of the same. It is clear, on a comparison of the labels, that the *defendant is not guilty* of any infringement *unless the use of a yellow-colored label makes him chargeable.* The position taken by the complainants that the essential part of their trade marks consists of a label having a yellow color, and that, therefore, they cover all yellow-colored labels used upon compressed yeast, and that the use by the defendant of a yellow-colored label upon the compressed yeast made and sold by him constitutes an unlawful imitation of their trade marks. The defendant has taken no testimony. The evidence of the complainants goes to prove that yeast with a yellow label sells readily, while yeast with a white label, or any color other than yellow, sells with difficulty—the cause of this being the reputation acquired in the market of the article manufactured by the complainants; and, further, that the public are deceived into buying other and inferior yeast having a yellow label as the genuine yeast made by them. *This case*

narrows itself down to the question whether a label of a single color, like the one in controversy, is the lawful subject of a trade mark apart from any name, figure, or device with which it may be connected, so that a person who adopts a similar color upon his label may be charged with an unlawful imitation. Color often serves as the groundwork of a trademark, and it may be a very essential element in its composition. In determining the question of infringement, it is often a very important circumstance. Browne, Trade Marks, pars. 263, 265, 267. But the term 'Mark' implies form rather than color, and it consists of some peculiar name, symbol, figure, letter or device whereby one manufacturer distinguishes his goods from like goods sold by other persons. Falkinburg v. Lucy, 35 Cal., 52. *The color of a label, apart from a name or device, can hardly be the subject-matter of a trade mark. The effect would be that a single manufacturer might acquire the exclusive right to the use of labels of a certain color, or to the colored paper in which his goods might be wrapped.* This might seriously interfere with trade and with legitimate competition. Browne, Trade Marks, pars. 271, 272. Whatever view may be taken by the French courts in the cases referred to by the learned counsel for complainants, we know of no American or English authority which goes to this extent. On the contrary, so far as the point has been touched upon in the adjudicated cases which have come to our notice, an opposite conclusion seems to have been reached. Falkinburg v. Lucy, *supra;* Faber v. Faber, 49 Barb., 357.

"It follows that the defendant, in using a label of a yellow color, is not guilty of any infringement of complainants' trade marks, and that the bill should be dismissed."

In a later case (Newcomer & Lewis v. J. A. Scriven Co., 168 Fed. Rep., 621, 94 C. C. A., 77) the doctrine is

thus aptly expressed by Judge (later Mr. Justice) Lurton:

> "Color, except in connection with some definite arbitrary design, such as impressed upon a circle, star or other figure, or employed in definite association with some other characteristics which serve to distinguish the article as made or sold by a particular person is not the subject of monopoly as a trade mark."

In Hopkins on Trade Marks (3rd Edition, 1917), Sec. 114, it is said:

> "It is a well settled rule that there can be no trade mark right in the mere form, size or color of an article used commercially, or the form, size or color of the package containing it."

5. Not One of the Features Which Specially Distinguish Petitioner's Label Appears on Respondent's Label.

Passing from the size, shape and color of the bottle to the color of the label, and from the color of the label to the other distinguishing features of it, we come to inquire what, if any, of the features which specially distinguish petitioner's label appear on respondent's. "The only question you will have then to consider," said the court in Payton v. Ward, 17 R. P. C., 58, quoted in U. S. Tobacco Company v. McGreenery et al., 144 Fed., 531, "is whether the defendants' get-up is so like the plaintiffs' as to be calculated to be mistaken for it. But when, as in this case and in the last, what is called the plaintiffs' get-up consists of two totally different things combined, namely, a get-up common to the trade, and a distinctive feature affixed or added to the common feature, then what you have to consider is not whether the defendants' get-up

is like the plaintiffs' as regards the common features, but whether that which specially distinguishes the plaintiffs' has been taken by the defendants."

We should look, therefore, to see what features specially distinguish the petitioner's label, and whether or not they, or any of them, appear on respondent's. The features which specially distinguish the petitioner's label are:

(1) The size and shape of the label.

(2) The name "Schlitz," with a characteristic "S" and paraph.

(3) The trade mark in blue of a globe encircled by a belt with the word "Schlitz" thereon, the word "Export" above the globe, and the words "Joseph Schlitz Brewing Company, Milwaukee, U. S. A." beneath it.

(4) The legend "The beer that made Milwaukee famous."

(5) The legend "The Brewery's own bottling."

Not one of these distinguishing features is to be found on the respondent's label.

The features of the two labels which are common are:

(1) The color [We have already referred to this. The color is not identical (Tr., 21 and 146), but may be so, and will be treated by us as if it were.]

(2) The white marginal line. (Nothing, we submit, is more common than a marginal line for a label, and this could hardly be said to be distinctive or peculiar.)

(3) Block letters in white. (White is the color in which the printing would naturally appear. It is the color of the paper before it is made brown for the label, and the white letters are made by simply leaving part of the original color of the label unchanged. Such lettering

could not be said to be original, distinctive or peculiar.)

(4) The words "Southern Select" on the one, and the word "Schlitz" on the other, appear in script of white letters margined in blue, the letters slanting from left to right. (Nothing is more common, we submit, than this style of printing. Slanting inscription of this kind cannot be said to be original with petitioner.)

(5) Blue appears in the trade mark of each label. (On the petitioner's label it is solid, and on the respondent's label it is a ring.)

(6) Both contain the statements as to volume and alcoholic strength required by the Pure Food Act. (But on respondent's label this is in white, and on petitioner's label it is in black, and occupies a different position on one from the other.)

The distinguishing features are most marked. They may be put down as follows:

(1) The size and shape of the label.

(2) The name of one beer is "Schlitz"; the name of the other is "Southern Select."

(3) One bears the legend "The beer that made Milwaukee famous" in a prominent position. The other contains no such legend, but plainly and prominently states that the bottle contains beer "BREWED AND BOTTLED BY HOUSTON ICE & BREWING ASSOCIATION, HOUSTON, TEXAS."

(4) The trade mark of petitioner has already been described. The trade mark of the respondent which appears on the label is altogether different, as will appear from the label, the most prominent feature of it being a bright red star in the center of it, with a white magnolia on the star. No such coloring appears on the label of

petitioner. This trade mark of respondent has been used since May, 1892. (Tr., 140.)

(5) The difference in shape of the labels requires a difference in dress for the bottles. Respondent's rectangular label is pasted near the bottom of the bottle, with the lower edge of the label parallel with the bottom of the bottle. Petitioner's label, in order that its sides may be kept parallel with the sides of the bottle, is placed on the bottle at an angle upward and towards the right.

There are other distinguishing features of the two packages with respect to labels: (1) Petitioner uses, or at the time the suit was filed used, no neck label on its bottle, but instead a small crescent shaped label in two colors is placed below the neck of the bottle. It does not extend so much as half way around the bottle. (See Exhibit "D," Tr., 21.) Respondent's label is a long, narrow, rectangular strip, and when applied to the bottle, makes a paper band extending entirely around the neck, and is done in five colors. Petitioner's crescent has on it the words "SCHLITZ BOTTLED AT THE BREWERY." The respondent's label has on it the words "SOUTHERN SELECT," and in prominent letters the name and address of respondent, with the trade mark in the same colors and lettering as on the main label. (2) Each brewery affixes to the cork of its bottle a tin or metal tag, with the name of the brewery plainly printed thereon.

Only those features of dress of petitioner's package can be looked to in determining whether or not there has been unfair competition, which specially distinguish this dress, and are the exclusive property of petitioner, and not those features which are common. We cannot look to

the brown bottle, because it is common. We cannot look to the brown label, because it is common. We cannot look to the white lettering, because it is common. We cannot look to the use of some blue coloring on the label, because this is common. The petitioner "must make out, not that the defendant's are like his by reason of those features which are common to them and other people, but must make out that the defendant's are like his *by reason of something peculiar to him, and by reason of the defendant having adopted some mark or device or label or something of that kind which distinguishes the plaintiff's from other goods which have, like this, the features common to the trade.* Unless the plaintiff can bring his case up to that, he fails." (Payton v. Snelling, *supra.*) We submit that by this test the petitioner has failed.

We may remark in passing, and perhaps should do so, that the Schlitz label on page 13 of the Transcript is not the proper one to be compared with the one immediately below it on the same page. The Schlitz label there shown is the label for the *quart* bottles. The respondent's label there shown is (or rather was, it now being abandoned) for the *pint* size. The Schlitz label for the pint size, which is the one with which the comparison should be made, appears on page 21 of the Transcript.

6. The Features Common to Both Packages do not Constitute a Collocation Which Could Be Said to Especially Distinguish Petitioner's Package or Be Said to Be a Collocation to Which Petitioner has an Exclusive Right.

If there are no distinctive or original features of petitioner's label which, taken singly, are to be found on re-

spondent's label, petitioner, neverthless, contends that the features of its package constitutes a collocation which itself amounts to a distinguishing feature, and for this reason the use by respondent of its label should be enjoined.

If the combination of features on petitioner's label was new or original, the contention of petitioner would be more persuasive. At this point in the brief it cites Anheuser Busch, etc., v. Clarke, 26 Fed., 410. We quote from the brief at this point (p. 101):

> "In *Anheuser Busch v. Clarke*, 26 Fed., 410, it appears the complainant was the first to use for bottled beer a label of customary size, with a small diagonal red band extending *downward* from left to right, with the name of the kind of beer 'Pale Lager,' appearing in white letters on the band. It appears that the defendant used a label of customary size which also consisted in part of a small diagonal red band extending *upward* from left to right, with the kind of beer, 'Extra Pale,' also appearing in white letters on the band. An inspection of the labels reproduced in color in Cox's Manual of Trade Mark Cases, p. 456, will show that they were otherwise strikingly dissimilar.
>
> "*No question of trade mark rights were involved*, but the court says:
>
> " 'The complainant's affidavits go to show that the complainant was the first to use for beer a label with a diagonal red band with the name of the kind of beer appearing in white letters on the red band, and that he has been habitually using this label for two years.
>
> " 'The label is a very noticeable and distinctive one by reason of the diagonal red band.
>
> " 'The result of the effect upon the eye from seeing a number of bottles is, that it is a beer labeled with a diagonal red band, and the more frequently one sees it the more this effect is deepened.

"'It does not appear altogether probable that a consumer who had been used to getting bottles labeled with complainant's label would more and more rely on the diagonal red band as its distinctive mark, and would be likely to accept the respondent's beer with his diagonal red label on it as supplying what he was it the habit of getting.

"'There is nothing in the difference in the labels calculated to counteract this, and I think it is a strong case of a similarity likely to deceive.'"

This case, we think, aptly illustrates the fallacy of petitioner's position. In the Anheuser Busch case it was not the use of red by complainant which the court protected, but it was *the use of red in an original and characteristic* way that was protected. The public had been accustomed to using red generally. The public had the right to continue to use red generally. But no one of the public had been using a *diagonal red band* on a label as a trade mark for beer. It was the *diagonal red band* that was original and was protected; not the color red.

So that if here the collocation was new and original, the case might be different in this aspect of it. But of what does the collocation consist?

(1) The use of the color brown for a label on a brown bottle. This is too elementary to be exclusive or original as against another user where the label is altogether a different size and shape.

(2) The use of white letters on a brown label on a brown bottle. We submit that in this combination there is nothing original.

(3) The use of blue in what could hardly be said a conspicuous manner on such a brown label with white letters on a brown bottle. Leaving out of consideration

altogether the features in which the labels are radically different in appearance, we submit that there is in this combination carried in this way to the fourth degree nothing which can be said to involve a use which could be held to be exclusive, or from which the public should be barred.

If it could be said to create an original and exclusive right to the collocation for one in designing a label merely to do so commonplace a thing, for example, as to select brown paper, have the inscription in white, have some of the letters block letters and others script, and use blue for portions of the printing, there would be but few labels which did not violate someone's rights.

In United States Tobacco Company v. McGreenery et al., 144 Fed., 531, it is said:

> "That the packages considerably resemble each other is obvious, but most of the resemblance arises from features which have been combined in common use, and to which no one has exclusive right. That anyone is deceived by the size, shape, tinfoil, or general makeup of the package, or by its paper, lettering or color, does not help the complainant's case. All these are old, separately and in combination. The complainant must show deception arising from some feature of its own, not common to the public. As was said in Coats v. Merrick Thread Co., 149 U. S., 562, 573, 13 Sup. Ct., 966, 970, 37 L. Ed., 847, the purchaser of thread is chargeable with knowledge of the fact that any manufacturer of six cord thread has a right to use a black and gold label, *and is bound to examine such label with sufficient care to ascertain the name of the manufacturer.*"

Other decisions denying such a right will appear later on herein.

It is not alone a label of the shape or size of petition-

er's, nor such a label with the inscriptions that this label bears which petitioner desires to protect and monopolize. What it desires is made manifest by this suit and by its brief, namely, to secure the exclusive right to the use of a brown label on a brown bottle as a trade mark for the sale of beer. When objection was first made by petitioner to the use by respondent of the label appearing on its bottle beer, respondent, through its attorneys, immediately offered to change the only feature of the label upon which alone any criticism could have been made. (Tr., 30.) The letter "S" in the words "Southern Select" on its label resembled the "S" in the word "Schlitz" on petitioner's label, although neither differed very much from ordinary script. And respondent did change its label in this particular at once, adopting an altogether different "S," and discarding the paraph on its first label, thinking that it had removed all possible grounds of objection. But this was not so. It had not changed the *color* of the label. The objection still remained, and, as respondent has since learned, will continue to remain as long as a brown label is used on a brown bottle, no matter what the inscriptions may be or what other distinguishing marks it may bear.

Petitioner refers in its brief in the Circuit Court of Appeals (pages 64 and 65) to labels, the use of which it has stopped. It boasts that as to some of such labels, only the color was the objectionable feature. On pages 67 to 69, it speaks of Lea & Perrins' sauce as being known as "Red Label Sauce"; of Curtis' catsup as being known as the "Blue Label Catsup"; of Kingsford's corn starch as being recognized as the "Yellow Wrapper Corn Starch"; of Palm Olive Soap as being the soap of the "Olive Green

Wrapper"; of "White Label Bass," bottled by McMullen, of New York; of "Red Label Bass," bottled by another bottler; of "Dog's Head Bass," bottled by still another bottler, and continues:

> "The Schlitz Brewing Company has been bottling its own beer for over twenty years. For twenty years its product destined for interstate and international trade has been put up in a *brown bottle, bearing a brown label.* * * * A beer in a *brown bottle,* bearing a *brown label,* to the consuming public, means 'Schlitz.' 'Schlitz' is *the brown label beer.*
>
> "The use of a brown label on a brown bottle for a period of twenty years to the exclusion of the world has made 'Schlitz' beer *the brown label beer.*"

No difference in inscriptions or marks on the label will suffice for petitioner's purposes. It wishes to have a monopoly of the field of a brown bottle and a brown label. It recognizes that the confusion in those few isolated instances related in the court below, in which the confusion was honest and genuine, resulted not from any similarity of the inscriptions or marks on the labels, but from the use of a brown label on a brown bottle.

Since petitioner would be equally opposed to the use by respondent of the brown label on the brown bottle, if the marks and inscriptions on respondent's label were changed, or no matter what the marks and inscriptions on such a label were, it is fair to assume that it is not the design of respondent's label to which it really objects, but it is its color, and that petitioner's efforts are to secure for itself, by this litigation, something to which it

is not legally entitled, namely, the exclusive right to the use of a brown label on a brown bottle. The position that it takes now and then that it bases its right to the protection which it asks upon a collocation consisting of the color brown and other features, is a mere pretense.

7. No Such Similarity Between the Labels as Would Cause an Ordinary Purchaser of Beer, Giving Such Attention to the Same as Such a Purchaser Usually Gives, to Purchase One, Supposing It to be the Other.

To entitle petitioner to the relief prayed, it must show more than that respondent has used features of the dress of petitioner's package *which belonged exclusively to petitioner*. Up to this point we have referred only to this. Petitioner must show also that, as a result of this, such similarity between the two packages exists that ordinary purchasers of beer, giving such attention to the same as such purchasers usually give, are caused to purchase one, supposing it to be the other.

What is the similarity to the distinctive features of another's label which will cause the respondent's label to be enjoined by a court of equity?

This question has been repeatedly answered by the courts.

> "True similarity is the likeness by which the *ordinary purchasers,* buying with *ordinary caution,* are likely to be misled. The perception of the extremely stupid or the extremely brilliant mind is not to be considered. The law presumes that the purchaser whom it must protect *en masse* is a man of ordinary intelligence and sense, and it is further presumed that in the buying he will use ordinary care, no more,

no less." (Nims, on Unfair Business Competition, paragraph 40.)

"A court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Two trade marks are substantially the same in legal contemplation if the resemblance is such as to deceive ordinary purchasers giving such attention to the same as such a purchaser usually gives, and to cause him to purchase the one, supposing it to be the other." (McLean v. Fleming, 96 U. S., 255, 256.)

"The maker of goods, in choosing a name, is not bound to insure against the negligent buyer, neither he nor his competitor has a right to the monopoly of trade of the careless or heedless, or those who have no preference as to which brand of goods they purchase. The law of unfair trade is intended to protect those who are careful—discriminating—in their buying, and who have preferences as to what they buy." (Nims, on Unfair Business Competition, paragraph 40.)

Counsel for petitioner, in their zeal in behalf of their client, have overlooked the fact that probable deception is the essential basis of their suit, and conceive themselves entitled to a judgment which will secure to their client a monopoly of brown body color beer labels. Aside from the fact that they could not acquire a property right in color alone, priority in the adoption of any label would not be sufficient unless the label charged to be an infringement was calculated to deceive. This was well stated by Justice Romer in Payton & Co., Ltd., v. Snelling-Lampard & Company, Ltd. (R. P. C., Vol. 17, 48, 53.)

"Too often it is supposed that the trial of that issue is the same thing as trying another question, namely, whether the plaintiff has not been the first person to adopt a novel get-up, and it seems to be supposed by some that if the plaintiff establishes in a

case like this that he is the first person to adopt what is called a new get-up, or a novel get-up, then the defendant could be restrained, if the defendant, being in the same trade, adopts that novel get-up. Of course, the two questions are really quite distinct. A trader, by adopting a novel get-up, does not thereby acquire a monopoly in that get-up."

Much has been said by petitioner about the "unwary purchaser." The "unwary purchaser" is included in the rule laid down in McLean v. Fleming. The type of the ordinary purchaser there referred to is found by taking into consideration *all* purchasers of beer, the wary and the unwary. Much has been said also about the "Character of the Article"; "Use to which the Article is Put"; "How Sold"; and "The Manner in which the Article is Sold." All these are necessarily taken into account in determining the characteristics of the "ordinary purchaser of beer," and in ascertaining the attention "which such purchasers usually give when buying beer," and are embraced in the rule laid down by the Supreme Court in the case mentioned.

Judge Sanborn, in Centaur Co. v. Marshall et al., 97 Fed., 785, in which two labels, each connected with the sale of Castoria, were involved, said:

"Every purchaser is charged with knowledge of the fact that anyone may make and sell Castoria, and if he seeks that made by one manufacturer, rather than that prepared by another, it is his duty to examine the wrapper with such a degree of care as will ordinarily ascertain who the manufacturer of the article which he purchases is. *The law imposes no duty upon the appellees to see to it that the careless and indifferent know that the Castoria which they buy is made by the appellant, and not by another.* They discharge their full duty to the appellant if they so dress

> their product that one who seeks to ascertain whose manufacture it is can readily learn, by a reasonable examination of their wrappers, whether it is made by the appellant, or by themselves."

So it is with beer. It is a drink which has no distinctive name. By whatever brewery made it is called beer. Any manufacturer of the article may use the name "Castoria." Any brewer may use the brown bottle. Any brewer may use a brown label. The public is charged with the knowledge of this law. The members of the public so charged include the ignorant as well as the intelligent; the illiterate as well as the literate. Under these circumstances it necessarily follows that if anyone is so discriminative that he really prefers one beer to another, he *must* pay *some* attention to what he is buying; "it is his duty," in the language of Judge Sanborn, "to examine the wrapper with such a degree of care as will ordinarily ascertain who the manufacturer of the article which he purchases is." This information as to the manufacturer, whether in the form of a trade mark or a name, ought not to be far to seek. The name of the manufacturer ought to stand out boldly, either by sign or by word. We submit that in this case it does.

Petitioner offered a number of witnesses on the trial below whose testimony apparently was offered to prove actual deception by sales of respondent's beer as and for that of petitioner's. Portions of the testimony of so many of these witnesses were given in petitioner's brief in the Court of Civil Appeals, and there is such necessity from respondent's standpoint of giving a fuller, if not a fairer statement of the testimony of most of the witnesses, we shall be required to trespass upon the time of the court

to review this testimony at somewhat greater length than we should prefer to do. A careful review of all of the testimony as to deception offered by petitioner, *disregarding that offered by respondent*, will show, we believe, a preponderance of evidence in favor of the contention of respondent that there is no such similarity between the labels that the ordinary person, giving such attention to the same as such a person usually gives, will be deceived.

W. F. Blum, a wholesaler at Temple, who testified that the respondent had taken awey the agency from him (Tr., 58), testified on direct examination that he had seen Southern Select sold for Schlitz. (S. F., p. 8.) On cross-examination he testified that he had seen this done in Temple a little over a week ago. When asked how many times before that he replied that he did not pay so much attention to it, but that he knew that it hurt his sale of Schlitz; that that was the reason he knew; that he went to a saloon man and asked him the reason why he was not handling any Schlitz, to which he replied that he had some Southern Select, was giving that to his patrons, and that "there was no kick." He says that that was all the saloon keeper told him; *that he did not say anything about fooling the patrons.* (Tr., 59.)

Mr. W. F. Buesing, a saloon keeper from San Benito, testified that he had seen his bartender get mixed, sometimes give Schlitz for Southern Select, and sometimes Southern Select for Schlitz. That this resulted from an honest mistake on the bartender's part; that he had seen it happen two or three times a week. (Tr., 59.) That Mr. Bernd, an employe of the Houston Ice & Brewing Company, who had been drinking Southern Select at his place for two or three months, came in and called for Southern Select, that the bartender gave him Schlitz,

that Mr. Bernd "took it up, and was just ready to take a drink, and he noticed it, and he said, 'look here, Dutch, I called for Southern Select.'" (Tr., 60.)

Clarence Selvage, a liquor drummer, testified that the first time he saw Southern Select put up in brown bottles he was in Brazos County; that he had ordered Schlitz, and was served respondent's product, that he was drinking the beer, when his attention was called to the label, and he examined it, and saw that it was not Schlitz. (Tr., 61.)

The label about which Selvage was testifying is not the label now in use by respondent, nor is it the one involved in this suit. With reference to the label now in use, Selvage testified that so far as he knew, he had never been deceived by it; *that he would not have any trouble in recognizing a bottle so labeled as not being a Schlitz bottle if he looked at it.* (Tr., 62.)

Frank Williamson, the gentleman who with an apparent reluctance admitted that he had an arrangement with petitioner under which he was interviewing witnesses and procuring their attendance at the trial, testified as follows:

> "A. I was down in Brownsville; I had some business there—I had been in Houston for a couple of months, and I went back to Brownsville, and in walking around, I met a friend of mine, and I said, 'Suppose you and I have a drink,' and he said, 'All right,' and we went in and walked up to the bar, and I said, 'What will you have,' and he said, 'What do you drink?' and I said, 'I am going to take a bottle of Schlitz,' and he said, 'That will do me,' and I turned to the bartender and I said, 'Give us two bottles of Schlitz,' and he went to the ice box and drew out two bottles of Southern Select, and my friend did not detect the difference until I called his attention to it." Tr., 64.)

McIntire, the man referred to in Williamson's testimony as the one who had drunk Southern Select for Schlitz beer, testifying about the *same incident*, said:

"Q. How did you happen to get together?

"A. I was coming from tin shop—I had had a piece of work at the tin shop—and I was walking up the street, and he said, 'Hello, Mack,' and I said, 'Hello, Frank,' and he said, 'Will you have a bottle of beer?' and I said, 'Sure, I would not mind,' and he said, 'Well, we will drop in here,' and we stepped in there, and he said, 'What will you have,' and I said, 'I will take beer—give me a glass of beer,' and he said, 'Well, take a bottle,' and I said, 'Whichever way you prefer, *I have no choice,*' and he said, 'Give us two Schlitz,' and they set two bottles out on the bar, and glasses, *and I had drank part of the glass, and Williamson looked up and said, 'Do you detect any difference in that beer?'* and I said, 'It don't taste exactly right,' and he said, 'Do you think this is Schlitz beer?' and I looked at the bottle and said, 'Why, it is not Schlitz beer.'

"Q. *How did you know it was not Schlitz beer?*

"A. *I saw the label on it.*

"Q. *You had not seen the label before that?*

"A. *I had not noticed it particularly, because I would naturally think it was Schlitz beer.*

"Q. As soon as you noticed it you saw and stated that it was not Schlitz beer?

"A. Yes, sir.

"Q. Did you have any difficulty at all, when you noticed it, in telling whether or not it was Schlitz beer?

"A. There was a small difference.

"Q. Could you tell at once that it was not Schlitz beer—I mean, look at the label and tell it was not Schlitz beer?

"A. *Yes, sir, sure thing.*

"Q. I understood you to say that up to that time you had not paid any attention to the label?

"A. Yes, sir.

"Q. That is true?
"A. Yes, sir.
"Q. That you had not paid any attention to the label at all up to the time you glanced at it?
"A. Yes, sir." (Tr., 66, 67.)

McIntire also testified that on one occasion he bought six bottles of beer; that he was not positive whether he called for Schlitz beer or not; that he is not positive, but he thinks there were two bottles of Southern Select put in for Schlitz. (Tr., 66.)

On cross-examination, however, he testified that he did not know anything about what beer it was, except what he was subsequently told by the man for whom he had bought the beer. (Tr., 67.)

George Barringer, at the time engaged as a bartender at the Interurban Buffet, testified that while he was employed as a bartender at the Bender bar he had substituted Southern Select for Schlitz beer, with the labels on the bottles. That on several occasions the customer detected the substitution. That substitutions were generally made in a rush, that some of the customers detected the substitution, and some did not, the proportion being about two out of ten or two out of twenty. (Tr., 72.) That when he first went to the Bender Hotel bar he inquired of the porter what the signs were; they were that if he wanted two bottles of Southern Select, and the man called for that, he would say "Two Schlitz"; if he wanted two bottles of Schlitz, he would say, "Two bottles Schlitz." (Tr., 69.)

Westley Johnson, the negro porter who worked with Barringer, testified that when a gentleman not familiar with the label called for a bottle of Schlitz he (the bartender) would say, "Bring me a bottle," and that meant

a bottle of Southern Select. That they did this as often as they could put it by. That when he wanted to substitute Southern Select for Schlitz, and the bartender did not give him a sign, he would holler, "Bottle." That they were able to put this by very frequently. That he was given his instructions by Charlie Zeller, the head bartender. That lots of times customers would call for Schlitz, and Southern Select was put out, and that they would notice the label, and then they would drink it, but they would say that they called for Schlitz, just the same. About one man in ten noticed the difference. (Tr., 70, 71.) Asked if a man that did get a good look at the label drank it for Schlitz, the witnesss replied that he had seen men who had drunk the beer half up think he had drunk Schlitz, that the reason he had not noticed it before that time was because he did not pay any attention to it until he had drunk half of it before noticing that it was Southern Select. (Tr., 71.)

Examined by the court, the witness testified:

> "Q. Sometimes men come into the Bender bar that would not be able to read the label on a beer bottle?
>
> "A. Yes, sir, men come on (in) and are so drunk they pay no attention, and if they ask for bottle Schlitz you could give him a bottle of Southern Select or *anything*.
>
> "Q. There was no trouble in imposing on a drunk man when he asked for a bottle of beer?
>
> "A. No, sir, he did not pay much attention to it." (Tr., 72.)

On re-cross-examination Johnson, in giving the signals used between him and Barringer, testified to an entirely different lot of signals from those which Barringer claimed to have used. (Tr., 73.)

John Nelson, a porter in the saloon of W. F. Blum, Jr., of Temple, testified that in the saloon in which he worked he frequently made a mistake, and hurriedly picked up Southern Select for Schlitz. That in order to avoid these mistakes the saloon man now handled Southern Select in *white bottles*. (Tr., 73.)

On cross-examination he testified that one could not be mistaken if he looked at the bottle without being in a rush. That he had trouble in telling the beers apart in a rush. That sometimes customers turned the bottle back, and told him he made a mistake. Sometimes they drink it and say nothing; sometimes they kick and send it back, and say, "I ordered Schlitz." That the way they find it was not Schlitz was by reading the label. That *when they get a chance to look at the label, and do look at it*, they can tell that it is Southern Select. That after a customer looks at the label he would not be deceived. That they make a mistake when they do not look at the label. That the saloon in which he worked did not sell any other beer in brown bottles except Southern Select. (Tr., 73.)

That he did not recall any instances where a customer was ever deceived who had looked at the label that was on the bottle. (Tr., 73.)

That in handling Southern Select for Schlitz he would *rub the label off* in the water, and one could not tell from the top whether it was Schlitz or Southern Select. (Tr., 74.)

J. R. Callahan, of Beaumont, agent for petitioner's beer at that point, testified that in the latter part of August or first of September, 1913, a porter on a trade excursion served Southern Select beer, thinking he was serving Schlitz. (Tr., 75.) He also testified that he and

a number of friends going from Houston to Beaumont stopped at Lang's Oyster Parlor, in Houston, on one occasion, and ordered seven bottles of Schlitz beer, that seven bottles of Southern Select were served, that none of the beer was drunk, but that the mistake was detected by someone of his party at soon as the beer was brought in. (Tr., 75, 76.)

C. L. Fisher, a saloon keeper at Beaumont, testified that he had been in business at Beaumont for himself a couple of years, and he had been keeping bar about five months since that time; that all the while he was in business he was serving Southern Select when Schlitz beer was called for; that he got by with it pretty regularly, once in a while someone mentioned it. (Tr., 76.)

He also testified that, from his experience of twenty years in the saloon business, after a man takes four or five bottles, he don't know what kind he is drinking; that that was the way he got by with some of it, but mostly he got by when the man did not exactly look at the label; that when a man has drunk three or four bottles of beer you can hand him almost anything in a bottle. (Tr., 77.)

J. A. Taylor, clerk at Anderson's soda fountain, testified that on one occasion at the Bender bar he had called for Schlitz and had been served Southern Select; that when he first tasted it he shoved it aside and said that he ordered Schlitz; that after he tasted it he noticed the label, and saw that it was Southern Select. (Tr., 78.)

He also testified that at another time and a different place he called for Schlitz and was served with a bottle of beer that did not taste like Schlitz; that he noticed that the label was partly torn off, and he examined it and saw

the letters "HOUS"; that after he tasted it he looked to be sure that it was not Schlitz. (Tr., 78.)

On cross-examination he testified as follows:

"Q. You glanced at the bottle, your attention having been called to it by a difference in the taste?

"A. *I did not glance at the bottle,* I just barely tasted it and found it was not Schlitz, and set it down.

"Q. *Then you looked at the label?*

"A. Yes, sir." (Tr., 79.)

On cross-examination he testified that he had been patronizing the Bender bar pretty regularly for about four years, and that George Barringer was the only one that ever attempted to make a substitution on him.

He also testified that the attempt to substitute Southern Select for Schlitz occurred to him only one time at the Bender bar. (Tr., 78.)

L. Anderson, manager of the Brazos bar, and part owner of the Brazos Hotel, testified that on one occasion he was in the Macatee bar and ordered a bottle of Southern Select; that he was served a bottle of beer and thought it was Schlitz, and called the bartender's attention thereto, whereupon the bartender informed him that the beer served was Southern Select; that he then read the label, and saw that the bartender was correct. That this was the first time he had ever seen Southern Select in the new bottles, and that he did not know before then that it was put up in brown bottles. (Tr., 79.)

On cross-examination he was asked this question and made this answer:

"Q. Were you drinking then?

"A. *Manifestly.*"

J. T. Booth testified that he lived in Beaumont; that on one occasion he, with Mr. Callahan and Mr. Swenson, were at Lang's Oyster Parlor with a party, and an order was given for Schlitz beer; that Southern Select was served; that he thought Schlitz beer had been served until he heard someone remark about not having the beer that was ordered, and that he then examined the label and saw that it was not Schlitz. (Tr., 80.)

On cross-examination he testified that he paid absolutely no attention to the order or the tray until the conversation came up about not having gotten what they ordered. (Tr., 80.)

E. H. Tomlinson, a saloon keeper at Stafford, in taking beer out of the ice box, two or three times picked up Southern Select for Schlitz; that the clerk did not discover his mistake until he, Tomlinson, called his attention to it; that at that time the beer had been set out on the counter, and the customer said, "Let it go." He also testified that he did not have any difficulty in distinguishing the bottles himself, except in the ice box; that then he would have to turn it over and see whether it was Southern Select or Schlitz; that none of his customers were ever deceived. That two or three of his customers remarked that deception could be practiced easily, that when they did not look at it they might believe it was Schlitz "if they did not look at the label." (Tr., 80, 81.)

W. Guse testified that he was in the saloon business at Bastrop; that in November, a year ago, during the Houston Carnival, he was in the Rice Hotel bar, when, to quote his own language, "I saw two gentlemen walk up and ask for two bottles of Schlitz beer, and the bartender reached down and got two bottles of Southern Select, *and as he took the bottles up he rubbed the labels off, and I am*

positive they were Southern Select; I know it when I see it." (Tr., 82.)

Mr. Kronshage, attorney for the petitioner, testified that on one occasion he was in the Rice Hotel bar when he heard three men come up, and each gave an order for Schlitz beer. That a bottle of Southern Select was served to one of the gentlemen, and Schlitz was served to each of the other two; that the men were engaged in conversation; that he called the party's attention to the fact that he had been served Southern Select instead of Schlitz, and all three of them expressed some surprise, and handed the bottle around. (Tr., 83, 84.)

Peter Breit testified (by deposition) that he had been running a saloon for a year and a half at Pharr, and six months at Danna; that he sold Schlitz, Southern Select and Alamo beer. (Direct Interrogatories 1 and 3.)

That as often as he had a chance he substituted Southern Select for Schlitz, because he was making two and one-half cents more per bottle by so doing. (Tr., 89.)

That in a rush one could sell Southern Select for Schlitz, and can sell it to men who can't read; that it looks so much alike after taking off the top label; that you couldn't do it unless you take off the top label; that they don't look at the label. (Tr., 91.)

J. E. Ellis testified by oral deposition that he had tended bar at Brownsville, and had himself operated a saloon at Matamoras. (Tr., 85.)

That he had served Southern Select to customers calling for Schlitz beer; that he served Alamo or Southern Select to customers who had been drinking; that when a customer came in who had not been drinking, and called for a bottle of Schlitz, that he would first give them a bottle of Schlitz. (Tr., 85.)

The witness further testified that he cooled his beer in ice water, and when customers came in in a rush he would strip the labels off when serving it. (Tr., 85.)

Asked if he could substitute a bottle of Southern Select for Schlitz, the witness replied that he could after the customer had drunk four bottles of Schlitz.

Asked if he had a brown bottle with a white label, whether or not he would be able to substitute it for Schlitz, the witness replied that he could by laying the bottle on cracked ice and permitting the label to fall off.

The witness further testified that he kept a large quantity of Southern Select, and a small quantity of Schlitz, for the reason that he had among the higher officers some swell customers that liked Schlitz beer; that often when these parties drink Southern Select, the bartender would jerk off the label. (Tr., 86.)

On cross-examination the witness testified that he had substituted Southern Select for Schlitz without shucking the label, first, to people who could not read or write; second, by sending out to his customers at tables beer in glasses, keeping the bottles at the bar; and, third, by sending out the beer in bottles with the labels on after his customers had had numerous drinks. That he would not have risked doing this with the first bottle. (Tr., 86, 87.)

That he had substituted Schober, Southern Select and Alamo beer for Schlitz; that after the first bottle he could serve any other kind of beer in brown bottle for Schlitz. (Tr., 87.)

We ask the court's indulgence for reviewing, somewhat at length as we have, the testimony of petitioner's witnesses offered to show cases of substitution. We

have endeavored faithfully to set out the testimony of every witness offered by petitioner to prove substitution, so that we might furnish the court a convenient digest of all of the testimony offered by the petitioner on this point.

Of these witnesses four testified to a continued course of substitution; they are George Barringer, C. L. Fisher, Peter Breit, and J. E. Ellis, a quartette, who, from their own admissions, are utterly unworthy of belief. Each is convicted by his own testimony of perfect willingness to perpetrate a fraud for remarkably small compensation.

Barringer testified to repeated substitutes at the Bender Hotel bar. He is directly impeached by the conflict in his testimony and that of Westley Johnson, the porter, as to the signs used between them in perpetrating the deception. He is likewise impeached by the testimony of Chas. Zeller to the effect that no such substitutions were practiced at the bar under his management; that he em ployed the bartenders and porters, among them Barringer and Westley Johnson; that he had had charge of the bar since it first opened; that he had never given instructions to substitute one beer for the other, but that his instructions were always to give every man what he called for.

Barringer is further impeached by the fact that the Bender Hotel Bar is owned and run by one of the owners of the hotel itself; that the bar caters to what may be termed the better class of trade, and that a practice such as Barringer referred to would work a serious injury to the business.

There are three other circumstances worth remembering in passing on the value of Barringer's testimony.

First, he claimed to have gotten this custom to substitute one beer for another from a negro porter, not the manager.

Second, at the time of his testimony he had a business relation with, if not a direct employment from, the local agent for Schlitz beer. Zeller testified that he was at one time manager of the Schlitz Bar, on Main Street, that he was employed by Mr. Japhet, the Houston agent for Schlitz beer, that he was succeeded as manager of the Schlitz Bar by Louie Rechter. That Rechter is now manager of the Interurban Buffet, where Barringer went for employment, at an increase in salary, upon leaving the Bender. If Barringer is willing to testify that he fraudulently substituted one beer for another to hold an eighty dollar ($80.00) job, it is not unreasonable to believe that he would swear falsely if he believed that such testimony would be pleasing to a man giving him a one-hundred dollar ($100.00) job. Petitioner offered no testimony tending to show that Mr. Japhet did not have a financial interest in the Interurban Buffet.

Third, although Barringer claimed that a regular practice of substituting Southern Select for Schlitz beer obtained in the Bender bar, young Taylor, the soda fountain clerk at Anderson drug store, testified that he had been a customer of the bar for four years, was a Schlitz drinker, and could detect the difference by taste between Schlitz and Southern Select, still only one time had he been served with Southern Select when he called for Schlitz beer.

Fisher did not handle Schlitz beer at all. His activities seemed to be limited to supplying what he had when something was called for that he did not have in stock. Even

he emphasizes the fact that it is much easier to make the substitution after a customer has had several drinks than it is to make a substitution with the first bottle.

Peter Breit, the peripatetic barkeeper from Chicago, Pharr and Danna, not only testified to substituting Southern Select with labels on for Schlitz, but also testified that he handled black bottles without any labels, which he also sold for Schlitz; that he had them put up special orders for that purpose.

It does not occur to us that the testimony of a man who brands himself as willing to swindle a customer for two and one-half cents per bottle will be taken to outweigh the court's own conclusion as to the similarity of the disputed labels themselves.

While Ellis' testimony brands him as altogether unreliable, still if there is any truth in what he says, his testimony hurts rather than helps the petitioner's case. By far the greater part of the substitutions to which he testifies were accomplished by stripping the label from the bottle. Another way he had of doing was to serve the beer in glasses to customers seated at tables, keeping the bottles at the bar. This evidence, it seems to us, fortifies respondent's contention that the labels which it is using sufficiently distinguish its product from that of the petitioner whenever the package is delivered to the customer in the condition in which it is put out by the respondent. The petitioner can have no just quarrel with the respondent if saloon keepers strip off the labels and rely on the brown bottle to work the deception.

Frank Williamson is another witness whose testimony gives the impression that he is not worthy of belief. True, he testified to one case where Schlitz beer was ordered

and Southern Select furnished. On cross-examination, however, he reluctantly admitted that on this and several other trips he made he had been looking out for evidence at the request of Mr. Swenson, a representative of petitioner in this territory; that he had made several trips, and that he had arranged for the attendance of McIntire, Buesing and Ellis as witnesses. Of course, there is nothing wrong with Williamson performing this service for petitioner, but his very apparent lack of frankness and hesitancy in giving the court the details of this litigation put a question mark after his testimony. Not only so, but he testified that he had been performing the services referred to, and making trips for petitioner, without compensation for his time. This is rather unusual in a man of his type in dealing with a matter of this kind. The apparently honest confusion testified to by Buesing Nelson and Tomlinson seems to have been fairly attributable to the use of the brown bottle, and the testimony of each is entirely consistent with a finding that any purchaser buying with ordinary care would promptly detect the difference in labels.

Selvage and Anderson each testified to having been misled one time, when they first saw Southern Select put out in brown bottles. Prior to that time they had always known it to be put out in a white bottle, with a white label. The label on the bottle testified about by Selvage and Anderson, as the record in this case shows, is not the label now used by respondent and involved in this suit. Not only so, but Selvage, when shown one of the labels now in use, testified that he would not be deceived by that label.

McIntire testified to a substitution when he was the

guest of Williamson, the gentleman who at that time was making unofficial investigation for the petitioner. In connection with McIntire's testimony, it is interesting to know that he called for beer without naming the brand, and in fact had no preference.

The incident testified to by Callahan and oBoth standing alone as it does, does not strongly support petitioner's contention. It seems that the order for Schlitz was given by the party to a waiter who in turn went to an adjoining bar to make the purchase. Whether the order was correctly transmitted, or whether the barkeeper purposely attempted to substitute the beer not ordered, does not appear from the evidence, but these witnesses do make it clear that none of their party was deceived, because attention to the difference was detected promptly after they were served. Of course, they were able to make the distinction by the labels only. Certainly the labels in that case did perform their mission, and notified intending purchasers that the beer furnished was the product of this respondent.

Taylor testified to two instances when he was served Southern Select and called for Schlitz. He detected the substitution first by the taste, and immediately thereafter by an examination of the label.

Mr. Guse testified to one case of substitution at the Rice Hotel bar. A customer, he says, called for Schlitz, the barkeeper slipped the label, and Mr. Guse detected that the beer furnished was Southern Select. This cannot help the petitioner's case, as the barkeeper apparently recognized that he had to get rid of the label to work the substitution, and the two labels are sufficiently distinct that Mr. Guse satisfied himself by a bare glance,

such as he had opportunity to make while the barkeeper was slipping the label, that it was a label of Select.

The two incidents testified to by Buesing and Bernd were apparently efforts to trap an employe of the Houston Ice & Brewing Company, and a loyal drinker of its product. They seem to have occurred after the filing of this suit, and may have been induced by the talk which arose by reason thereof. In any event, the proof seems to be undisputed that Bernd promptly detected the difference, even before he tasted the beer.

This disposes, we think, of all of the petitioner's testimony on cases of actual substitution. It is true that the record shows a few isolated cases of genuine confusion, but the law does not require respondent to put out a package so distinctive that a heedless or careless buyer could never be deceived. It does not require the respondent to put out a package so distinctive that one cannot be deceived, who, in the language of the court in Coca-Cola Co. v. Glee-Nol Bottling Co., 221 Fed., 61, "is so utterly unobservant when he gets and consumes such a beverage that deception might with equal success be practiced upon him, whether there is, or is not, a resemblance in any identifying particular between what he calls for and what he gets."

Such a requirement would drive respondent out of business entirely.

8. Great Weight Should Be Attached to the Conclusions of the Trial Court on the Conflicting Evidence.

The trial judge heard the testimony, and found in support of respondent's contention. The judge of that court had an opportunity to see the witnesses and to observe

their manner of testifying. No written record can fairly reflect these occurrences in the court room.

In DeLaval Sep. Co. v. Iowa Co., 194 Fed., 423, which was for infringement of a patent, the court, in referring to the conclusions on the question of fact reached by the trial judge, said:

> "When the chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be taken to be presumptively right; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they must be permitted to stand."

To the same effect, and involving a similar question, is the case of Tilghman v. Proctor, 125 U. S., 136.

The Circuit Court of Appeals will not disturb the conclusion of a trial judge on disputed questions of fact, where the hearing was on oral testimony, except for cogent reasons, such as a palpable mistake or misconception of the decided weight of the evidence. Barton Bros. v. Texas Produce Co., 135 Fed., 355; Pugh v. Snodgrass, 209 Fed., 325; Carey v. Donohue, 209 Fed., 328; United States v. Marshall, 210 Fed., 295.

In the case last cited the suit was to cancel a patent, The court said:

> "On this appeal the controversy is purely one of fact. * * * To secure a reversal upon such a basis as that just mentioned the appellant must convince us not only that the trial court may have been wrong, but that it was manifestly wrong. There must, under the holdings of this court, have been an 'obvious error' of law or a 'serious mistake' in dealing with the facts.
>
> "The error must be 'clear and palpable.' The conclusion of the trial court is 'presumptively right.'

> • • • While no doubt the circumstance that the District Judge personally heard the witnesses tends to strengthen the presumption in favor of his conclusions, the fact that he did not hear such witnesses, but that the proofs before him were entirely by deposition or upon examiner's report, does not destroy the presumption. Such still exists in favor of his conclusion. To hold otherwise would in effect be to make this the court of first instance. The District Court is not in such matters a mere conduit. It, not this court, is the trial court. Our functions are simply to guard against manifest error on its part, and this is true whether such arises upon hearing witnesses or upon reading a record."

In American Rotary Valve Co. v. Moorehead, 226 Fed., 202, the court held:

> "Under the new equity rules, as well as under the old rules, the reviewing court has the right and the duty of trying the questions of fact *de novo;* but the findings of fact below are not to be disturbed unless it clearly appears that the trial court has either misapprehended the evidence or has gone against the clear weight thereof."

This court, in a comparatively recent case (United States v. United Shoe Machinery Co., 247 U. S., 32, 41), uses this language:

> "We are therefore admonished at once of the complexity of the case and the maze of mechanical technicalities into which we should be plunged in estimating the evidence if we had not the guidance of the opinions of the judges of the trial court. The court found, as we have said, that the companies were not in competition at the time of their union in the United Company, and based the finding not only upon the testimony of witnesses, but the uses of the machines of the respective companies and their methods of operation. The testimony was con-

flicting, it is true, and different judgments might be formed upon it, but from an examination of the record we cannot pronounce that of the trial court to be wrong. Indeed, it seems to us to be supported by the better reason. We should risk misunderstanding and error if we should attempt to pick out that which makes against it and disregard that which makes for it, and judge of witnesses from their reported words, as against their living presence, the advantage which the trial court had."

9. An Inspection of the Labels Themselves Leaves Nothing to Be Said to Show That There Is No Unfair Competition.

As said by Lord Russell: "One must be guided very largely by the judgment one forms from the use of his own eyesight." (Liebig's Extract of Meat Co. v. Chemist's Co-operative Society, Rep. of Patent, Design and Trade Mark Cases, Vol. 12, pp. 736, 738.)

Associate Justice Brewer, when he was sitting as Circuit Judge for the Eighth Circuit, put it this way:

> "Elaborate description of points of resemblance or those of difference are, taken by themselves, alone, always unsatisfactory. The eye, at a glance, takes in the whole of one exhibit and the whole of another; and the comparison thus made of the two is surest, and the only satisfactory way of satisfying the judgment as to the existence of the alleged deceptive imitation."

And, again, in the same case:

> "We shall not stop to review the testimony which is offered upon the question whether the resemblances between the two packages and labels were calculated to mislead, or whether in fact they did operate to mislead. It is enough to say that there was testimony on both sides of these questions, and, perhaps, looking

at the matter of testimony alone, it might be difficult to say on which was the preponderance, *but such testimony*, giving it all the weight it is entitled to, *does not disturb the conclusions which we have reached from an inspection of the packages and labels themselves. We cannot surrender our own judgment in this matter because others may be of a different opinion, or because it happens, in isolated instances, that some purchaser was so careless as not to detect the differences.* It may well be that where many sales were made some individuals, not particularly attentive, may have purchased the defendant's supposing they were purchasing the plaintiff's package. Such things will happen in the ordinary course of business, no matter how great the differences, and the fact that they do happen, while it is not to be ignored, is not to outweigh the evidence which comes from a personal inspection of the packages and labels." (Lorillard v. Peper, 86 Fed., 956, 960.)

We appeal, therefore, to your Honors' own judgment on an inspection of the labels themselves to support the claim of respondent that there is no such similarity between the two labels as will result in confusion by anyone who paid any attention at all to the label. The labels appear on the first pages of this brief.

10. The Authorities Abundantly Support the Position of Respondent of No Unfair Competition.

Unfair competition may be defined as passing off, or attempting to pass off, on the public the goods of one man as being the goods of another. It consists essentially in the conduct of the trade or business in such a manner that there is an expressed or implied representation that the goods and business of one man are the goods and business of another.

As said by Chief Justice Fuller, in Howe Scale Company v. Wycoff, 198 U. S., 140:

> "The essence of the wrong in unfair competition consists of the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

Justice Sanborn, of the Eighth Circuit, in Kann v. Diamond Steel Co., 89 Fed., 706, puts it this way:

> "The deceit or probable deceit of the purchaser so that he buys or probably will buy the articles of one manufacturer or vendor in the belief that they are those of another, is a *sine qua non* of such a suit, because everyone has the undoubted right to sell his own goods, or goods of his own manufacture as such, however much such sales may damage or injure the business of another. The diminution, injury, even the destruction, of the business of a competitor by such sales is not an injury in the legal sense, and will warrant no relief, because it is the effect of the exercise of an unquestioned right. In cases to restrain unfair competition by assimilation of trade and dress, it is only when the likeness deceives or will probably deceive the buyers into the belief that the goods of one manufacturer or vendor are those of another, and only to the extent that it thus deceives that any legal injury, or that a court of equity may grant relief."

E. Regensbury & Sons Co. v. Juan F. Portuondo Cigar Mfg. Co., 142 Fed., 160, is a case passing on the color of the label. The opinion comes from the Circuit Court of Appeals for the Third Circuit, and is by Justice Gray.

The complainant, engaged in the manufacture of cigars, sought to restrain the defendant from using a certain kind of band around its cigars. Both bands were dark

brown, differing very little from the color of the cigar wrapper, and the lettering on both was white. In the opinion of the Circuit Court the opinion of the trial court is set out at length; among other things, the trial judge said:

> "The trade mark to which the combination lays claim is a band described in the patent, to which is added the brown color and the white lettering displayed thereon. The mark is not registered, and its common law validity need not, I think, be discussed. Assuming that the field was clear for its adoption, and conceding that it was put into use in June, 1900, while the defendant's band was adopted in 1903, I am unable to see sufficient evidence of infringement, even if the complainant's mark be given its widest lawful scope. *Certainly the color alone could not be appropriated by the complainant as a trade mark,* nor the shape alone, nor the material alone; and even the combination of these three elements could not make a valid trade make, because *neither singly nor in combination do they point to the complainant as the source from which the goods are derived. Something more is needed to supply this defect, and this is found, if at all, in the lettering upon the band.* But, after this is added, and assuming that a valid trade mark has now been produced by combining the four elements referred to, it remains to inquire whether the defendant's band infringes; and upon this point I think that an inspection, which need not be minute, shows plainly that the differences are apparent to an ordinary, careful observer. The defendant's band contains nothing but a name in script, evidently imitating an autograph, while the complainant's band contains a firm name in block letters, the word 'Trade mark Pat. Dec., 1902,' and the initials 'E. R. & S.' *It is likely enough that a near-sighted man, or a man with impaired vision, unaided by glasses, or a man in so much of a hurry as to be unwilling to stop for a careful look, might mistake*

one band for the other, but these classes may be disregarded in applying the test of similarity. Certainly an ordinarily intelligent man, able to see and to read, and willing to take a few seconds' time to examine the two bands, would inevitably discover that one of the banded cigars was made by the complainant, and the other by the defendant. And if this is so, it is clear that the charge of infringement has not been established. The complainant's evidence concerning confusion of the two bands is too slight to support the charge.

"The averment of unfair competition has still less to support it. The defendant's band was selected with no reference to the complainant's, and with no intention to imitate it, even remotely. In point of fact, as already stated, it does not resemble it so closely as to deceive a person of ordinary intelligence and powers of observation, and so far as they have two features in common—a brown color and white lettering—the resemblance was not intended, and was not adopted, with any design upon the complainant's trade.

"A decree may be entered dismissing the bill, at the cost of the complainant." (Page 162, 163.)

Commenting on the foregoing, Judge Gray said:

"There is little to add to the findings of fact and conclusions of law set forth in this opinion. It is perfectly clear that complainant's claim that they are entitled to the exclusive use, as a trade mark, of a cigar band made of brown colored paper, of a peculiar shape, by being wider at one end than at the other and lettered in white letters, as illustrated in the specimen attached to their bill, cannot be maintained. *Such appropriation, if sustained, would extend to any brown band of about the width shown by complainant's specimen, on which the true source or origin of manufacture or ownership is printed in white letters.* No claim is made to the distinguishing feature of the name 'E. Regensburg & Sons,' printed

on the band of complainant. The defendant has used a narrow brown band with the name 'Juan F. Portuondo' in white letters. The white lettering on complainants' band are block letters, while those on defendant's are script. There is also other lettering on complainant's band, while there is no other lettering on defendant's band, as pointed out by the learned judge of the court below. These bands are really labels upon the cigars, containing the name of the manufacturer. It *is elementary that size and color of label cannot be appropriated as a trade mark.* The principles of morality underlying the law both of trade mark and unfair competition, do not contenance so absurd a proposition as that a person may not designate the origin or ownership of the goods he sells, by printing his name upon a label attached to them. In this case there is nothing peculiar in the form of the label. It is a straight band, of a width suitable to hold the name, which is printed in white letters because the band is dark in color. *The distinguishing thing about the label is the name, and this sufficiently distinguishes the defendant's from the complainant's label.* That one end is made wider than the other is immaterial, as the ends do not show as the cigars are laid in the box. Any person turning the cigar over and inspecting it closely enough to observe this peculiarity in the shape of one end could hardly fail to notice the name of the label. The label, then, of both complainant and defendant is of the usual and obviously convenient shape for the purpose of displaying the name placed upon it. There is no other mode of labeling a cigar that is as convenient or so obvious as a straight, plain band of suitable width to encircle a cigar and hold the name of the owner or producer. A straight, white band of suitable width, with the name of the maker of the cigar in black lettering, might as well be claimed as a trade mark. *No such appropriation of obvious and simple methods of advertising one's name on his productions can be appropriated.*" (Pages 163, 164.)

Every phase of the issue in the case at bar has been before the courts from time to time. For the court's convenience, we copy largely from the opinions in the cases to which we wish to refer.

P. Lorillard Co. v. Peper, 86 Fed., 956, before Justices Brewer, Sanborn and Riner—Eighth Circuit—opinion by Justice Brewer:

> "We think, therefore, that we are called upon to inquire whether defendant's package, with either the earlier or the later label, was in itself a deceptive imitation of plaintiff's package and label, or so used as to create that unfair and illegal competition which the law denounces, and for which it affords compensation. If the earlier label was not an unfair imitation, the later certainly was not. The change was in the direction of difference, and not in that of resemblance. So we shall address our inquiry to the former. That there are some matters of resemblance is obvious, and it is equally obvious that there are essential and marked differences, and the inquiry in these cases is not fully answered by calling attention to either the several matters of resemblance or those of difference. The question is whether, taking the defendant's package and label as a whole, it so far copies or resembles the plaintiff's package and label that a person of ordinary intelligence would be misled into buying the one supposing that he was buying the other. And in such a case, as said by Lord Russell in Liebig's Extract of Meat Co. v. Chemist's Co-operative Soc., decided by the British Court of Appeals November 20, 1896, and reported in the Reports of Patent Design and Trade Mark Cases (Volume 12, pp. 736, 738), 'one must be guided very largely by the judgment one forms from the use of one's own eyesight.' Elaborate descriptions of the points of resemblance or those of difference are, taken by themselves alone, always unsatisfactory. The eye, at a glance, takes in the whole of one exhibit and the whole of another; and the comparison

thus made of the two is the surest, and the only satisfactory way of satisfying the judgment as to the existence of the alleged deceptive imitation. Here are the two labels, omitting the coloring. (Labels are shown.)

"Now, whatever minor points of resemblance may be pointed out between these two labels, it seems to us the differences are so pronounced that there is no reasonable ground to apprehend that any man of ordinary intelligence would be misled. The two principal ways by which an article is distinguished in trade are, first, *the name of the manufacturer;* second, *the descriptive name.* It is said that the plaintiff had acquired a reputation which attached to all of its manufactures, and that Lorillard's tobacco, particularly in the district where the competition arose between plaintiff and defendant, was generally known, and known as a superior article. Concede this, and it appears in the most marked way upon the defendant's label that it is not Lorillard's tobacco that he is selling. The name 'Pepers' is in the largest letters, and the most conspicuous place. No one who was looking for Lorillard's tobacco could for a moment be deceived into the belief that this was that tobacco. There is no similarity between the names. Neither the number of syllables nor the number of letters are the same, and there is only one letter in the two names alike. The other principal mode of identification is *the name under which the article passes,* and here the difference between the two names (though perhaps not so pronounced) is still marked and obvious. 'Tuberose' and 'True Smoke,' when spoken, do not sound alike, do not suggest the same idea; and while, considering the number of letters, and the letters themselves, there is more of similarity than between the names of the manufacturers, yet the contrast between the two is apparent at a glance. So that in the *two important features—those by which a purchaser identifies that which he wishes to purchase—the differences are so radical and obvious that it is difficult to perceive how*

anyone could be misled. Beyond these significant matters it may be noticed that the *plaintiff's label is a narrow one,* 1½ inches in width, circling around the center of the package; the *defendant's a broad one,* 2¾ *inches wide,* and covering nearly the whole length of the package.

"We shall not stop to review the testimony which is offered upon the question whether the resemblance between the two packages and labels were calculated to mislead, or whether in fact they did operate to mislead. It is enough to say that there was testimony on both sides of these quetions, and, perhaps, looking at the matter of testimony alone, it might be difficult to say on which was the preponderance; *but such testimony,* giving it all the weight that it is entitled to, *does not disturb the conclusions which we have reached from an inspection of the packages and labels themselves. We cannot surrender our own judgment in this matter because others may be of a different opinion, or because it happens, in isolated instances, that some purchaser was so careless as not to detect the differences.* It may well be that, where many sales were made, some individuals, not particularly attentive, may have purchased the defendant's, supposing they were purchasing the plaintiff's package. Such things will happen in the ordinary course of business, no matter how great the differences; and the fact that they do happen, while it is not to be ignored, is not to outweigh the evidence which comes from a personal inspection of the packages and labels." (Page 960.)

"But, * * * it must be noticed that the form of the package and colored stripes were not new in defendant's business, so in these respects he was not simply imitating the plaintiff. Both the form and color of the stripes were in frequent use among manufacturers, and the plaintiff had no special rights in respect to either. It has doubtless been found by experience that a cylindrical package is more convenient for slipping into and taking out of a pocket, and therefore they who use tobacco prefer packages in

that form. And, as between a white and a striped package, the variety of color appeals to the eye, and, other things being equal, the purchaser is apt to take the latter. But these are matters of convenience and attraction in common use, and which any manufacturer is at liberty to adopt, and in adopting which he trespasses not the slightest upon the rights of others." (pp. 961-2.)

Kann et al. v. Diamond Steel Co. et al., 89 Fed., 706, before Justices Sanborn, Thayer and Shiras—Eighth Circuit—opinion by Justice Sanborn:

"This is an appeal from a decree which dismissed a suit in equity that had been brought to restrain the appellees from imitating the trade mark of the appellant, and from selling their goods marked with that trade mark or any simulation of it. *Every suit of this character is founded on the fact that the action, or the proposed action, of the defendant has deceived, or is calculated to deceive, ordinary purchasers buying with usual care, so that they have purchased, or will probably purchase, the goods of the defendant under the mistaken belief that they are those of the complainant, to the serious damage of the latter.* The *deceit*, or probable deceit, of the *ordinary purchaser* to such an extent that he buys, or will probably buy, the property of one manufacturer or vendor in the belief that they are those of another, is a *sine qua non* of the maintenance of such a suit, because everyone has the undoubted right to sell his own gods, or goods of his own manufacture, as such, however much such sales may diminish or injure the business of competitors. Mr. Justice Duer, in the leading case of Manufacturing Co. v. Spear, well stated this rule in these words: 'At present it is sufficient to say that, in all cases where a trade mark is imitation, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, *and it is only when this false representation is directly or indirectly made,*

and only to the extent to which it is made, that the party who appeals to the justice of the court can have a title to relief." Manufacturing Co. v. Spear, 2 Sandf., 599, 606; Canal Co. v. Clark, 13 Wall., 311, 322; Gorham Co. v. White, 14 Wall., 511, 528; McLean v. Fleming, 96 U. S., 245, 255, 256; N. K. Fairbanks v. R. W. Bell Mfg. Co., 23 C. C. A., 554, 77 Fed., 869, 876.

"There is no evidence in the record that any purchaser was ever actually deceived so that he purchased the German product in the belief that it was the abradant made by the appellant. The words and symbols upon the various packages of these abradants sold by the appellant and the appellees respectively, necessarily varied to some extent with the size and shape of the packages, but these are fair samples of those used in the trade by the parties to this suit." (page 709.)

"The burden was on the appellant to show that the use of the symbol and words which marked the German product were calculated to deceive ordinary purchasers, and to create confusion in the trade. It was open to it to do this by evidence that the use had actually done so, or by the ocular demonstration of a comparison of the symbols and words which marked the packages in which the two products were offered for sale. It produced no proof of actual deception, and thus left the question whether or not the dress in which the German product is clothed is calculated to deceive the ordinary purchaser to the arbitrament of the eyes. When they are turned upon the two trade marks, either simultaneously or successively, the general impression is one of difference and dissimilarity." (p. 710.)

"However this may be, when all the words and symbols used by these litigants upon their respective packages as they are actually offered for sale to the trade are considered, all possibility of their confu sion, or of the mistake of the one for the other, seems to disappear. *The name of the product, the name of its manufacturer,* and the *place of its manufacture,*

are certainly three of the most distinctive characteristics by which one article of commerce may be distinguished from another. All these are printed upon the packages of this product around the respective symbols of these competitors. The name of the material branded upon appellant's packages is either 'Crushed Steel' or 'Steel Emery'; on the appellees' it is 'Diamond Steel.' The name of the manufacturer printed on the appellant's package is 'Pittsburgh Crushed-Steel Company, Limited,' and on the appellees' it is 'Diamant-stahl Werk'; and the place of manufacture printed on the appellant's packages is 'Pittsburgh, Pa., U. S. A.,' while on the appellees' it is 'Alchemitz.' When it is considered that *these differences of symbols, of names of the articles, of names of the manufacturers, and of the places of manufacture,* all appear on the face of the respective packages as they are offered for sale, and that they are all emphasized by the use of different letters and a different arrangement of words, while the only hint of similarity is the fact that a diamond-shaped figure and the picture of a radiant diamond may both be called a diamond, the logical inference confirms the ocular demonstration which the sight of the two trade marks makes, and leads irrisistibly to the conclusion that the dress in which the German product is clothed is not calculated to give a false impression to the public, or to deceive any purchaser who exercises any degree of care in the selection of his goods." (p. 711.)

"A considerable part of the evidence and argument for the appellant was devoted to establishing the fact that Robert J. Marx and the appellees adopted and used the word 'Diamond' and the picture of a radiant diamond, with the intention or deceiving purchasers and diverting the business of the appellant. The conclusion we have reached renders it unnecessary to consider this evidence. If Robert J. Marx and the appellees ever had such a purpose, they never used any means calculated to accomplish it, and they adopted those admirably suited to defeat

it. Their intention, therefore, becomes immaterial. A wrong done or threatened, and consequent injury, or probable injury, to the complainant, are indispensable elements of every cause of action. The intention to injure another, if no injury is done, and none ever will be done, constitutes no ground for relief. The intention on the part of the alleged infringer to induce purchasers, through the use of a simulated trade mark, to buy his goods under the belief that they are another's, furnishes no ground for relief, unless the similarity between the two trade marks is of character 'to convey a false impression to the public mind, * * * and to mislead and deceive the ordinary purchaser.' McLean v. Fleming, 96 U. S., 256; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 23 C. C. A., 554, 77 Fed., 869, 876. The reason for this rule is that neither actual nor probable 'injury' in the legal sense of that word, results from the use of a trade mark that is not calculated to mislead the public or to deceive the purchaser, and hence one of the indispensable elements of a good cause of action is wanting. Whatever may have been the intention of Robert J. Marx and the appellees in adopting and using their trade mark, it does not sufficiently resemble that of the appellant to mislead purchasers, or to convey a false impression to the public. There is no evidence in the record that the appellant has ever suffered any injury from any deception caused by it, and there is no probability that it ever will. Such a case presents no ground for relief, either in law or in equity. The decree below is affirmed." (pp. 712, 713.)

Centaur Company v. Marshall et al, 97 Fed., 785, before Justices Caldwell, Sanborn and Thayer—Eighth Circuit—opinion by Justice Sanborn:

"Every suit to restrain the simulation of the dress of merchandise is based on the fact that the defendant will thereby deceive the purchaser into buying his goods as those of the plaintiff, to the latter's

damage. The deceit, or the probable deceit, of the purchaser, so that he buys, or probably will buy, the articles of one manufacturer or vendor in the belief that they are those of another, is a *sine qua non* of such a suit, because everyone has the undoubted right to sell his own goods or goods of his own manufacture as such, however much such sales may damage or injure the business of his competitors. The diminution, injury, even the destruction, of the business of a competitor by such sales is not an injury, in the legal sense, and will warrant no relief, because it is the effect of the exercise of an unquestioned right. In cases to restrain unfair competition by the simulation of trade dresses, it is only when the likeness deceives, or will probably deceive, the buyer into the purchase of the goods of one manufacturer or vendor as those of another, and only to the extent that it thus deceives, that any legal injury results, or that a court of equity may grant any relief. Kann v. Steel Co., 89 Fed., 706, 707, 32 C. C. A., 324, 330, 61 U. S. App., 22; Manufacturing Co. v. Spear, 2 Sandf., 599, 606; Canal Co. v. Clark, 13 Wall., 311, 322, 20 L. Ed., 581; Gorham Co. v. White, 14 Wall., 511, 528; McLean v. Fleming, 96 U. S., 245, 255, 256, 24 L. Ed., 828; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed., 869, 876, 23 C. C. A., 554.

"The case in hand differs from an ordinary suit to restrain the use of simulation of a trade name, in this: that in such a case the duty is imposed upon a defendant of distinguishing the name of his product from the name of the complainant's product, so that a purchaser may not be misled into buying his article as that of his competitor, while in the case at bar the appellees have the same right as the appellant to sell their medicine under the name by which that of the appellant is described and known. The name of the appellant's product is 'Castoria,' and the conceded law of this case, upon this preliminary hearing, is that everyone has the right to make and sell Castoria under the very name which the appellant uses to describe and advertise its medicine. Every

one is presumed to know the law, and, in this state of the case, if the appellees sell their Castoria to those who seek this medicine simply, but who are careless or indifferent whose manufacture they purchase, they may thereby prevent the appellant from making sales and gaining profits which it would otherwise have obtained, but they inflict no remediable injury upon it, and furnish no ground for relief, because they deceive no one, and they violate no duty which they owe to the appellant or to the public, but merely exercise a commercial right which they possess. Every purchaser is charged with knowledge of the fact that anyone may make and sell Castoria, and *if he seeks that made by one manufacturer rather than that prepared by another, it is his duty to examine the wrapper with such a degree of care as would ordinarily ascertain who the manufacturer of the article which he purchases is.* The law imposes no duty upon the appellees to see to it that the careless and indifferent know that the Castoria which they buy is made by the appellant, and not by *another. They discharge their full duty to the appellant if they so dress their product that one who seeks to ascertain whose manufacture it is can readily learn, by a reasonable examination of their wrappers, whether it is made by the appellant, or by themselves.* Coats v. Thread Co., 149 U. S., 564, 567, 572, 573, 13 Sup. Ct., 966, 37 L. Ed., 847.

"Turn now to the wrapper, and see if, in view of these rules of law, a purchaser who sought the appellant's Castoria, and who made an ordinary or even cursory examination of the wrapper of the appellees, would probably be deceived into buying their product in the belief that it was the appellant's. The Centaur Company is a corporation of New York, and its medicine comes from that State. The wrapper of the appellee gives fair warning that the product which it contains *is not made by the appellant, and that it is not manufactured in New York.* It carries on its face the statement, 'Prepared by Castoria Medicine Co., Kansas City, U. S. A.,' and the words

and letters, 'Castoria Medicine Co., Kansas City, U. S. A.' are printed in large, black letters, which would readily catch the eye and fasten the attention of any buyer who examined the product to learn its manufacturer. The radical differences between the wrappers are so marked and striking that such a purchaser can hardly mistake the one for the other. The dissimilarities are carefully noted and enumerated in the opinion of the court below in 92 Fed., at page 610, and we will not receit them again here. Suffice it to say that whether the wrapper of the appellees is taken by itself or in comparison with that of the appellant, whether its general appearance to the inquiring glance of a purchaser who seeks the Centaur Company's product is considered, or it is subjected to a careful and critical analysis of the resemblances and differences between it and the wrapper of the ap pellant, the result is the same. The conclusion is irresistibly forced upon the mind that such a buyer cannot be deceived by it into the purchase of the product of the appellees for that made by the appellant, and that there was no error in the refusal of the court to enjoin its use before the final hearing of the case.

"The arguments of counsel that a more sweeping injunction should have been issued because the appellees were manufacturing spurious Castoria, because they were promoting its sale by fictitious testimonials, because they were using on their wrappers the catch sentence, 'Children cry for it, physicians recomend it,' which the appellant had so advertised that the public recognized it as referring to Castoria, and because their acts disclosed an intent to pirate the business of the appellant, have not been overlooked. But the gravamen of the charge in the bill is not that the appellees are selling spurious Castoria, nor that they are using fictitious testimonials, nor that they are publishing the catch sentence of which complaint is made, but it is that they are selling Castoria under wrappers which deceive the purchasers into the mistaken belief that it is the appel-

lant's product. The vital question on this preliminary hearing is whether or not the use of the wrapper with which the appellees are permitted to clothe their product, under the existing injunction, will probably effect this deceit, and in this way seriously injure the appellant, before this case can be brought to a hearing on its merits. If it will probably have this effect, the injunction should be broadened; if it will not, there is no just ground for its modification. This question has already been carefully considered, and the conclusion has been reached that the use of this wrapper is not calculated to, and probably will not, injure the appellant. This conclusion is decisive of the question now before us. It leaves no basis for a more sweeping injunction, and it must control this appeal. In view of the fact that this main charge of the bill is not sustained by the proof, it will be soon enough to consider the minor questions presented when the issues in the suit have been framed and the evidence has been taken. Nor is the fact that the appellees intended by the use of their abandoned wrappers, by the publication of the extract from Hall's Journal of Health, by the use of the words 'New Label,' and by other acts, to deceive the public and to engage in unfair competition with the appellant, sufficient to overcome the controlling fact that the wrapper which they now use is not calculated to deceive, and probably will not mislead, buyers. If the use of these means of advertising was proof of an intent to deceive the public and to pirate the business of the appellant, the discontinuance of their use is evidence of the abandonment of this intent. Moreover, the intent is only material when the effect of the means used to accomplish it is doubtful. When, as in this case, it clearly appears that the dress used will not deceive, the purpose with which it is used furnishes no sufficient ground for an injunction. A wrong done or threatened, and consequent injury or probable injury to the complainant, are indispensable elements of every cause of action. Neither actual nor probable 'injury' in the

legal sense of that word, results from the use of a trade dress that is not calculated to mislead the public or to deceive purchasers, and hence one of the essential elements of a good cause of action is wanting. the intention on the part of an alleged infringer to induce purchasers, through the use of a simulated trade mark or dress, to buy his goods under the belief that they are another's, furnishes no ground for relief, unless the similarity between the two trade marks is of a character 'to convey a false impression to the public mind * * * and to mislead and deceive the ordinary purchaser.' McLean v. Fleming, 96 U. S., 254, 24 L. Ed., 828; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., 77 Fed., 869, 876, 23 C. C. A., 554, 561; Kann v. Steel Co., 89 Fed., 706, 713, 32 C. C. A., 324, 330, 61 U. S. App., 22." (pp. 788-791.)

American Brewing Co. v. Bienville Brewery, 153 Fed., 615, opinion by Justice Toulmin:

"But in a case of an alleged violation of a valid trade mark, the similarity of brands must be such as to mislead ordinary observers in order to justify a restraining injunction. A court of equity will not interfere when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Columbis Mill Co. v. Alcorn, *supra;* Howe Scale Co. v. Wyckoff, 198 U. S., 140, 25 Sup. Co., 609, 49 L. Ed., 972." (p. 618.)

"By comparison, we find the characteristic trade marks and labels of the respective parties to this suit to be as follows: The essential features of the complainant's trade mark as declared in its state ment, are:

"The pictorial representation of a globe, and an American eagle perched thereon, holding with one talon the United States flag, and holding in its beak a pennant or streamer bearing the letters and punctuation marks A. B. C.

"On the defendant's label there is no representation of a globe. The American eagle thereon is much

smaller and of a different color than that of the complainant's. The United States flag is in a different position, is larger, of a brighter coloring, and more conspicuous, and it is not held in the talon of the eagle. There is a wreath of leaves in its beak, instead of a pennant or streamer, and there is an entire absence of the letters and punctuation marks 'A. B. C.,' which prominently appear on the label of the complainant above the word 'Bohemian,' and which letters are declared to be essential features of its trade mark. The word '*Bohemian*' appears on both labels. It is not mentioned in the description of complainant's trade mark as one of the essential features of it, but on the defendant's label it seems to be the prominent word. It is of larger type, and light blue in color, while on the complainant's it occupies a secondary position with regard to the letters 'A. B. C.,' is smaller type, and white in color, with very small, pale blue outlines. *The labels are about the same size and shape.* Both labels have the names of the respective breweries in large, *red* letters, and the names of their location—the complainant's in prominent red letters, and the defendant's in black letters. Are the labels apt to be mistaken by purchasers? There are some minor points of resemblance. Each has an eagle and the United States flag, but of different size and color, and in different positions. Each has the word 'Bohemian,' but different in size of type and color. But we should look at the matter as a whole—both at the resemblances and differences—to ascertain whether, in view of the differences, the resemblances are so marked that the ordinary purchaser would be likely to be deceived or misled. Lorillard v. Peper, *supra*, Galena Signal Oil Co. v. Fuller, *supra;* Lamont Corliss Co. v. Hersher (C. C.), 140 Fed., 763.

"The court, in Lorillard v. Peper, said:

" 'The court must use its own judgment as to similarity of packages and labels, and the fact that others may differ with it in opinion, or that a few

isolated purchasers have been misled, does not necessarily bind it.'

"In the case at bar we find on their respective labels the *names of the manufacturers distinctly and prominently appearing, and also the descriptive name of the beer manufactured by each*—on the one, 'A. B. C. Bohemian,' on the other 'Bohemian,' on the one 'Saint Louis,' in large, red letters, at the top of the label, on the other, 'Mobile, Ala.,' at the bottom of the label. Other distinguishing characteristics have already been shown, and, as before suggested, there is no proof that any purchasers have actually been misled. Their infringement of the complainant's trade mark, as charged, must be clearly shown; and the charge that the defendant is guilty of unfair competition, resulting in confusion of goods, to the injury of the public, and to the invasion of complainant's rights, must be satisfactorily proved."

Postum Cereal Co., Limited, v. American Health Food Company, 119 Fed., 847, before Justices Jenkins, Grosscup and Baker—Seventh Circuit—opinion by Justice Jenkins:

"It is claimed that the name is of similar general character, and in many features identical; that the package used by the defendant is the same in size and shape, and identical in its three dimensions; that the background is of the same color, with the same distinctive features of dress, color and arrangement, and therefore the competition is unfair. We need not enter into discussion of the conflicting evidence with respect to the intention and motive of the officers of the appellee, because that is of no moment, if the dress itself is not calculated to deceive purchasers. Centaur Co. v. Marshall, 38 C. C. A., 413, 97 Fed., 785. The question recurs whether we can say that these *labels are apt to be mistaken*, the one for the other. There may be, indeed, some minor points of resemblance, but we should look at the matter as a whole—both at the resemblances and the

differences—to ascertain whether, in view of the differences, the resemblances are so marked that the *ordinary purchaser* would be likely to be deceived, and should look at the subject in the manner suggested by Mr. Justice Brewer in Lorillard Co. v. Peper, 30 C. C. A., 496, 86 Fed., 956, that:

"'In determining the question of fraudulent imitation of packages and labels, merely noting the points of difference or similarity is not sufficient. The packages and labels must be considered as a whole.'

"The question resolves itself to this: *Whether these two labels are so alike that one of ordinary intelligence, desiring to purchase the one product, would be misled into purchasing the other.* The ordinarily inattentive purchaser is attracted by sound and color, and possibly to some extent by the size of the package. It appears here that the question of the size in the manufacture of the carton for cereals is determined by the proprietors of the paper mills manufacturing them, by the size of a pound of the product, and that all cereal food is sold in like packages. It is proven, also, that a large proportion of packages containing cereal food, before the placing of 'Grape-Nuts' upon the market, was of a yellow background. The background of the two packages in question is somewhat similar in color, although that of 'Grain-Hearts' is of a lighter shade than that of 'Grape-Nuts.' But there are certain distinctive marks which are peculiarly suggestive to the eye, which, in our judgment, so stamp these labels and indicate such marked dissimilarity that we think the purchaser, who, relying upon his knowledge of the character of the brand he wishes, should mistake the one for the other, *would be stupid indeed.* The band in the complainant's label upon which is imprinted the compound word 'Grape-Nuts' in yellow lettering, extends directly across the face of the package, and is said to be of a dark blue color, although 'tis hardly distinguishable from black. The band upon the defendant's package runs obliquely

across the face of the package, and is said to be of a dark blue color, with the compound word 'Grain-Hearts' upon it in white letters, and this band runs across a large red heart, prominently displayed. This device appears upon every side of the defendant's package, while the band of the complainant's package is only upon the face and back. The distinguishing feature of the defendant's label is the red heart. It is so marked and so pronounced that one could not fail to see it, and it would challenge the attention of any person—even a stupid person—who, seeking to purchase the product of the complainant, and knowing its label, should be presented with the product of the defendant.

"The point of resemblance insisted upon in the use of the *double hyphen* in the compound word appears to us of slight moment. It is unusual, indeed, to use the two parallel lines, but we doubt if any but the most observant purchaser would notice it. An inattentive purchaser, using the slightest care, would observe the distinguishing feature of the red heart a hundred times where the careful and attentive purchaser would notice the double hyphen once, and the latter, observing it, would not be deceived, for the same care would disclose the prominently displayed red heart peculiar to the one and absent in the other.

"We need not pursue the subject. We are fully satisfied that the dissimilarities are such, and are so pronounced, that the one label is not likely to be mistaken for the other.

"The decree will be affirmed." (Pages 852-853.)

Continental Tobacco Co. v. Larus & Bro., 133 Fed., 727, before Justices Goff, Morris and Purnell—Fourth Circuit—opinion by Justice Morris:

"This is an appeal from a decree of the Circuit court refusing to grant to the complainant an injunction against the defendant, restraining alleged unfair competition in trade by the defendant selling

its plug smoking tobacco of its brand known as 'Richmond Best Navy,' in competition with complainant's plug smoking tobacco of the brand known as 'Master Workman.'

"The complainant is the owner of a brand of plug tobacco mostly used for smoking, and principally sold in New England, which was originated about the year *1884* by J. Wright & Co., the complainant's predecessor in title, and widely known as 'Master Workman.' The defendant, in like manner, is the owner of a brand of the same class of plug tobacco originated by Larus & Bro., its predecessors in title, about the year *1898*, and known as 'Richmond Best Navy.' The gravamen of the complaint is that by reason of the use by the defendant of a tin tag of the *same size and color* as the complainant's tin tag, affixed to each section of the pound plug of tobacco of the same size and apearance as the complainant's, the defendant has put on the market a plug smoking tobacco, which, by the similarity of the tin tag, in connection with the other similarities, produces confusion and deceives consumers, so that the defendant is unfairly and deceitfully palming its tobacco on unobservant purchasers who desire to get the complainant's tobaco, to the injury of complainant's business.

"This class of tobacco is usually manufactured into plugs weighing about a pound, and in shape about twelve inches long, by three inches broad, and three-quarters of an inch thick. The complainant's plug is indented across at intervals of about two inches by indented lines, marking the plug into six pieces, for convenience in cutting up for the consumer. Each of these pieces is marked with the words 'Master Workman' by indented letters impressed into the surface of the tobacco, and on the reverse side of each piece is indented the name of the original proprietors of the brand, 'J. Wright & Co.'

"The defendant's pound plug is divided by indented lines into five pieces, each of which is in like manner indented with the words 'Richmond Navy Best,'

and on the reverse side of each piece appears in raised letters the words 'Richmond Navy Best.' This method of putting up plug tobacco is shown to be in common use, and not distinctive. In addition to these marks upon each piece of the plug so marked off for convenience in cutting, there is affixed on the tobacco *both of the complainant and the defendant, a yellow tin label or tag, circular in shape, and about one inch in diameter, and it is the use of this yellow tin tag which is the real substance of complainant's charge of unfair competition. The lettering, however, upon the respective tin tags, is distinctively dissimilar.* Upon the complainant's tag appears in black letters, around its circumference, the words 'Master Workman,' and across the diameter in red letters, the word, 'Genuine,' Upon the defendant's tag appears in black letters around the circumference the words 'Richmond Navy,' and across the diameter in very large, red letters the word 'Best.' At the distance at which anything at all can be read on these labels, the lettering is easily distinguishable the one from the other.

"The charge of similarity rests upon the size of the circular tag, which is somewhat larger than the tag most customarily used for the purpose, and the yellow color, which was the color of the tag which complainant from the first adopted. It is shown, however, by the proofs that tags of all colors, yellow included, are used on plug tobacco by manufacturers, and that their sizes vary. There was produced as an exhibit by the defendant a plug of smoking tobacco of the same size and similar in appearance to that of both the complainant and defendant, manufactured and put on the market by the R. A. Patterson Tobacco Company, on which is affixed a yellow tag of just the same size as both that of the complainant and defendant, with the words 'Honest Labor' in black letters around the circumference, and a picture of a workman's arm, in red, in the center. The proof is that this label has been in use for about 10 years. It may possibly be charged

by the complainant that this, too, was a deceitful imitation of the complainant's tag, but if such a charge could be justly made, it is strange that during 10 years it never has been made. The depositions speak of two other brands similarly marked by the defendant as far back as 1881, viz: 'Fairplay' and 'Luxury,' Tin tags and paper tags of a similar appearance, of various shapes, sizes and colors, the witnesses say, have been in common use on plug tobacco for at least 20 years, and this is matter of common knowledge.

"From an inspection of the exhibits, in connection with the weight of evidence, we think it clearly appears that the matters in which the defendant's plug of tobacco is similar to complainant's—that is to say, the size and shape of the plug, the indented marking to assist in cutting off the smaller piece, the use of the indented name of the manufacturer, the use of a yellow tag, lettered with the name of the brand —are in common use, and in the present case the manufacturers' names are easily read, and are so dissimilar that there appears to us no ground for the contention that there is an unfair imitation likely to deceive.

"As to actual deception, the proof is not at all convincing; the most that is established is that the plugs look alike, and, *if the illiterate and inattentive purchaser was guided by the color and size of the circular tag alone, he might mistake one for the other, but that is quite true of* almost all forms of manufactured tobacco. The answer of the defendant, sworn to by the originator of the 'Richmond Best Navy' brand, swears that there was never any purpose or intention to imitate the complainant's 'Master Workman' brand, or to attempt in any way to appropriate the trade of the complainant by creating any confusion as to their respective brands.

"It is urged that the illiterate persons, such as those who mostly use this kind of smoking tobacco, look only at the color and size of the tag, but this is not good ground for relief, for we find from the

proofs that the color and size of the yellow circular tags is not of itself a distinction which either manufacturer can appropriate.

"We think the Circuit Court rightfully decreed that the complainant is not entitled to relief, and the decree is affirmed."

Perhaps the strongest case in the books in support of petitioner's contention is Fairbanks v. Bell Mfg. Co., 77 Fed., 869. From this case it appears that prior to the year 1897, soap powders were uniformly white in color, were sold in comparatively small packages, generally rectangular, holding six ounces, eight ounces, or a pound. In the spring of that year complainant began the manufacture of a yellow powder, and gave it the name of Gold Dust. A new form of package devised by complainant was a radical and distinguishable departure from any soap powder package then in existence. By no possible chance could anyone mistake complainant's package for that of its competitors. It was a larger package, holding four pounds, rectangular, six-sided, and covered with paper of dark yellow color. To quote a further description of the package from the court's opinion:

"A little above the center of the principal panel there is a vignette, representing two naked negro children, standing behind a heap of gold coin; upon a white scroll, which arches over the vignette, there is, in black letters, the word 'Fairbank's'; below the vignette are the words 'Gold Dust'; at the bottom of the panel the words 'Washing Powder,' white, on a black ground. There is no border to this panel, but in the upper corners are two circular spaces, inscribed, respectively, with the mark '4 lbs.,' and with an heraldic device, black on yellow. The rear panel contains a statement, in black letters on the yellow ground, extolling the excellencies of the powder. On

the two side panels, in like manner, are printed statements of the purposes for which the powder may be used, and directions for using it. The lettering runs across these side panels, and justifies with the lines on the back and front panels. On the top and bottom panels are further commendations, and a warning to beware of imitations, all in black letters on the yellow ground. All the panels except the front one are surrounded with a border consisting of a light blue strip included within heavy black lines. The width of the border is a little under one-quarter inch.

"Having devised this distinctive package, complainant offered its goods for sale under the name of 'Gold Dust' washing powder, and has continued the use of that style of package continuously until now. It has made great exertions to extend the sale of its product, has expended upward of $300,000 in advertising it, and has thereby created a large demand in every State and Territory of the United States, having sold upward of 100,000 packages within the twelve months ending June, 1894. Purchasers for consumption usually ask for 'Gold Dust,' sometimes, adding the words 'washing powder,' and sometimes, but more rarely, 'Fairbank's'. Shortly after the introduction of complainant's four-pound package, James S. Kirk & Co. also put upon the market a four-pound package of 'Kirkoline' washing powder, rectangular, and covered with dark yellow paper. Inspection of the package is sufficient to show that, although in size, form and color it is like complainant's they differ so widely in general appearance that one cannot be mistaken for the other. Other exhibits of subsequent packages, rectangular in form, and of the four-pound size, show plainly how easy it is to devise a distinctive style of wrapping which will present no resemblance whatever to plaintiff's package. When it is remembered that, besides size, color and shape, there is an almost endless variety of border, scroll work, lettering and decoration available for the production of what, in the completed package, makes up

the general appearance, it is manifest that no one need pack his goods into cartons resembling his competitor's, unless he choose so to do." (Page 872.)

As far back as 1884 the defendant was making a white soap powder, put up in packages nothing like the new package of the complainant. In 1892 or 1893 defendant began the manufacture of a yellow powder, and thereupon selected a new name and devised a new form of package. Of this package the court says:

"Defendant's package is rectangular, and, of course, of the same size as other four-pound packages. The paper covering it is dark yellow, of about the same shade as complainant's. A little above the center of the front panel is a vignette of a sow washing a pig. The vignette is arched over with a white scroll; but, whereas, the scroll in complainant's package is a segment of a circle, in defendant's it is apparently a segment of an ellipse, and its ends are turned outward towards the edges of the package. On the white scroll, in black letters, is the word 'Buffalo,' and below the vignette the words 'Soap Powder,' in white, partly on a yellow, but mainly on a black ground. On the bottom are the words 'R. W. Bell Co., Buffalo, N. Y.' There is no border on this panel. In its upper corners there are two separate spaces—the one containing the mark '4 pounds,' white on black, the other a buffalo's head, black on white. The rear panel is filled up with commendations of the contents, black letters on yellow ground. The same is true of the top and bottom. On the two side panels are directions for use, such as appeared on the original Soapona package, but they are printed in black on yellow, and the lines no longer run lengthwise, but across, the panel, justifying with the lines on the front and rear panels. Around every panel, except the front one, there is a border, from an eighth to a quarter inch in width, consisting of a very pale blue center, bordered by two heavy black lines. Pos-

> sibly the center of the border is white, but, if so, the heavy black lines, by an optical illusion, give it the appearance of pale blue. The corners of the border in complainant's package are rounded; in defendant's they are right-angled." (Page 873.)

Defendant continued the sale of its yellow soap powder in both the old style package and the new style package, pushing the sale principally in the new package. It was a sharp competitor of the complainant, offering the soap in the same territory at a price of twenty-five per cent. below the wholesale price of complainant. Although there was strong proof of actual substitution by retail dealers of defendant's package, when complainant's was called for, still the trial court reached the conclusion that there was no such similarity as would justify the issuance of an injunction. The Circuit Court of Appeals for the Second Circuit, on an examination of the labels, taken in connection with the testimony of substitution, reached a contrary conclusion, and reversed the judgment of the trial court, but in doing so it distinctly reversed the right of defendant to use a yellow covering for its package. In outlining the order to be entered, the court said:

> "Injunction should issue against putting up and selling or offering for sale the particular form of package which has been referred to in the bill and put in evidence as 'Defendant's Second Package,' or any other form of package which shall, by reason of the collocation of size, shape, color, lettering, spacing and ornamentation, present a general appearance as closely resembling the 'Complainant's Package,' referred to in the bill and marked in the evidence, as does the said 'Defendant's Second Package.' This would seem to be sufficient; but, since so much has been said about the impossibility of framing any decree which would prevent the sale of the package

complained of, and yet not give complainant the monopoly of *yellow* paper for its wrappers, the following clause may be added: 'This injunction shall not be construed as restraining defendant from selling packages of the size, weight and shape of complainant's package, nor from using the designation 'Buffalo Soap Powder,' nor from making a powder having the appearance of complainant's 'Gold Dust,' nor from using paper of a yellow color as wrappers for its packages, provided such packages are so differentiated in general appearance from said 'Complainant's Package' that they are not calculated to deceive the ordinary purchaser." (Pages 878, 879.)

Even in this case it is held that compalinant is not entitled to a monopoly of paper of a certain color for a wrapper for its package. The court's opinion clearly indicates that all that is required is to so mark the packages that they may be distinguished, and in its order the court distinctively reserves to the defendant the right to use the yellow wrapper. In the case at bar the petitioner is claiming a monopoly of the brown label, and it asserts this claim, no matter what distinguishing marks are placed thereon, and when your Honors stop to consider the many breweries that are putting out beer in bottles, and that are using labels thereon, the result of giving to any one brewery an exclusive right to any given color would be to limit the use of colored labels to a favored few. The obtainable colors are few, and no manufacturer of beer has a right to an exclusive use of any given color in its labels. Such we understand to be the uniform ruling of the courts on this point.

American Tobacco Company v. Globe Tobacco Company, 193 Fed., 1015, opinion by Justice Angell:

> "It is insisted that the use on three of the packages of the words in quotation marks, 'The Labor

Leader,' above the word 'Union,' and at same distance from the word 'World,' amounts to an infringement of trade mark, and a wrong to complainant, in view of the general likeness of the size and color of the packages, and of the way in which, and the extent to which, the complainant has advertised its goods. There are some resemblances in the packages, but most of them arise 'from features which have been combined in common use and to which no one has exclusive right.' *That anyone is deceived by the size, shape, tinfoil, or general makeup of the package, or by its paper, lettering, or color, does not help the complainant's case. All these are old, separately and in combination.* The complainant must show deception arising from some features of its *own* not common to the public. Lowell, J., in U. S. Tobacco Co. v. McGreenery (C. C.), 144 Fed., 532, affirmed 144 Fed., 1022, 74 C. C. A., 682. In that case the maker of 'Central Union' cut plug sought to enjoin this complainant from putting out 'Union Leader' without the tri-colored band above mentioned. Injunction was denied. The Central Union package is in evidence here. The Union Leader package without the band, in my judgment, is more easily mistaken for the Central Union than for the Union World. Complainant has no exclusive right to the red color, nor to the size and shape of the packages, nor to the use of the gilt letters on them. These things are undeniably open to trade.

"The controlling question in this case is: Has the complainant any just ground of complaint because of the use by defendant or its package of the words 'Leader' and 'Union' as they appear?

"The rule is settled that 'equity will not interfere where ordinary attention by the purchaser would enable him to discriminate' between the goods put out by the parties, and that one is not bound to prevent a purchase by a careless purchaser. McLean v. Fleming, 96 U. S., 245, 24 L. Ed., 828; Coats v. Merrick Thread Co., 149 U. S., 562; 13 Sup. Ct., 966, 37 L. Ed., 847; Columbia Co. v. Alcorn, 150 U. S., 467,

14 Sup. Ct., 151, 37 L. Ed., 1144; Lorillard Co. v. Peper, 86 Fed., 956 30 C. C. A., 496; Continental Co. v. Larus, 133 Fed., 729, 66 C. C. A., 557; Regensburg v. Portuondo Co. (C. C.), 136 Fed., 869; American Brewery Co. v. Bienville Co. (C. C.), 153 Fed., 615; Jamison Co. v. Jamison, 15 R. P. C., 189; Fels v. Hedley Co., Ltd., 21 R. P. C., 91; King & Co., Ltd., v. Gillard & Co., Ltd., 22 R. P. C., 327.

"With the *tri-colored band in use*, it is hard to see how a person, even illiterate, who cared at all what goods he got, could be deceived into taking defendant's goods for complainant's. The testimony as to deception in the record, if admissible, only goes to show that careless purchasers have probably been deceived, not that purchasers who took enough interest in their purchases to look at the packages before pocketing them, were deceived. The defendant puts on its package nothing remotely resembling the distinguishing band used by the complainant.

"It is urged by complainant that the court ought not to regard this tri-colored band. But it had been used by complainant after the decision of the McGreenery case for some time before defendant began putting out 'Union World,' and there seems to be no just reason for overlooking it in the makeup of complainant's goods. But, if it were disregarded, I am not prepared to hold that a person exercising ordinary care in buying would be deceived by the packages. As above stated, he would, in my opinion, be less likely to be misled by the likeness of the packages involved in the McGreenery case. The testimony for complainant indicates that the ground of mistake would be the red package, and the use of the word 'Union.' Clearly the defendant cannot be forbidden to use a red wrapper with the word 'Union' on it. In the present case that word on the smaller packages is printed in distinctly different type from the word on complainant's package, and is above a symbol wholly unlike that on complainant's package." (Pages 1017, 1018.)

Newcomer & Lewis v. Scriven Co., 186 Fed., 621, Sixth Circuit, before Justices Lurton, Severns and Knappen, opinion by Justice Lurton:

Scriven & Co. were makers of men's drawers, of cotton material. A woven fabric made of Egyptian cotton was inserted in the seams, to make the garment elastic. This knitted fabric was of a buff or yellowish color in its undyed and natural state. Complainants had had a patent on the garments so made. After the expiration of the patent the defendants began the making of a similar garment, using buff colored fabric in the seams. The purpose of the injunction was to prevent defendants from making and selling men's drawers in connection with which the fabric of the characteristic color was used. The trial court granted an injunction. The Circuit Court reversed the trial court and dismissed the bill. Judge Lurton said:

> "Color, except in connection with some definite arbitrary design, such as impressed upon a circle, star or other figure, or employed in definite association with some other characteristics which serve to distinguish the article as made or sold by a particular person, is not the subject of monopoly as a trade mrak."

Coats v. Merick Thread Co., 149 U. S., 565, opinion by Justice Brown:

In the bill of complaint in this case, J. & P. Coats charged that the Merrick Thread Company were guilty of an unlawful and unfair competition in business, in that they had been infringing the right of plaintiff in and to certain marks, symbols and labels used by plaintiff to designate a spool of thread put out by it. Cuts showing the ends of the two spools are shown at page 566 of the

opinion. On the end of each spool is affixed a paper label with black letters on a gilt ground. On complainant's labels were the words "J. & P. Coats Best Six Cord, 200 yards," and in the center, figures 40, denoting the size of the thread. Outside of this label, and embossed on the end of the wooden spool, in each quadrant of the circle, are the figures 40, likewise designating the size of the thread. On defendant's label, in black letters on a gilt background were the words, "Merrick Thread Company, Best Six Cord." The label has a star in the center, and at its lower edge the figures 40, indicating the size of the thread. Outside of the label, and on the four quadrants of the circular end of the spool are the figures 40, likewise denoting the size of the thread. Between these numbers on defendant's spool are stars, instead of the loops shown on plaintiff's spool. Plaintiff's spool had been on the market in America since 1840, and their spools have borne the black and gold label as above described since that time. In holding that the plaintiff was not entitled to an injunction, among other things, the court said:

> "There is no doubt a general resemblance between the heads of all spools containing a black and gold label which might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this. Having, as we have already held, the right to use the black and gold label, and the periphery embossed with the number of the thread, they were only bound to take such care as the use of such devices, and the limited space in which they were used, would allow. In short, they could do little more than place their own name conspicuously upon the label, to rearrange the number, by placing it in the border, instead of the center of the label, and to omit loops of the plaintiff's periphery, and substitute their own star between the numerals. Having done this, we

think they are relieved from further responsibility. If the purchaser of such thread desires a particular make, he should either call for such, in which case the dealer, if he put off on him a different make, would be guilty of fraud, for which the defendants would not be responsible, or should examine himself the lettering upon the spools. He is chargeable with knowledge of the fact that any manufacturer of six cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name of the manufacturer. Indeed, the intent to imitate plaintiff's spool heads, if any such intent existed, is manifest rather in the label than in the periphery, but plaintiffs having submitted to this without protest for twelve years, have waived their right to relief upon this ground. McLaughlin v. People's Railway Co., 21 Fed. Rep., 574; Ladd v. Cameron, 25 Fed. Rep., 37; Green v. French, 4 Bann. & Ard., 169; 3 Rob on Pats., p. 1194. Having already held that defendants had a right to make use of the embossed numeral in the periphery, their union of the two devices upon the same spool head, both being originally designed to be used in conjunction, cannot be made the basis of a suit."

United States Tobacco Company v. McGreenery et al., 144 Fed., 531, Circuit Court, District of Massachusetts. Opinion by Lowell, Circuit Judge (affirmed 144 Fed., 1022).

This is a bill in equity to restrain unfair competition, which is alleged to arise from defendant's imitation of complainant's paper label or wrapper used to make up packages for cut tobacco. The packages are of the same size. The paper is of the same quality and dark red color. The lettering is gilt, and the conspicuous words are printed in much the same type. After giving a detailed description of the two packages, the court continues:

"Wrappers like those of the complainant, in shape, size, tinfoil, colored paper, and style of gilt lettering, have long been common. The defendant owns several 'brands' of this sort, which are older than the complainant's. The color of the paper has long been used to designate a mild tobacco. Varied devices, unlike complainant's or defendant's, have been printed upon similar packages. 'Cut Plug' merely describes the kind of tobacco inclosed. The phrases 'Smoke and Chew' and 'Smoking-Chewing' are also old in the art. Gail v. Wackerbarth (C. C.), 28 Fed., 286. That the packages considerably resemble each other is obvious, but most of the resemblance arises from features which have been combined in common use, and to which no one has exclusive right. That anyone is deceived by the size, shape, tinfoil, or general makeup of the package, or by its paper, lettering or color, does not help the complainant's case. All these are old, separately and in combination. The complainant must show deception arising from some feature of its own, not common to the public. As was said in Coats v. Merrick Thread Co., 149 U. S., 562, 573, 13 Sup. Ct., 966, 970, 37 L. Ed., 847, the purchaser of thread 'is chargeable with knowledge ofthe fact that any manufacturer of six cord thread has a right to use a black and gold label, *and is bound to examine such label with sufficient care to ascertain the name of the manufacturer.*' 'He (the plaintiff) must make out, not that the defendant's are like his by reason of those features which are common to them and other people, but he must make out that the defendant's are like his by reason of something peculiar to him, and by reason of the defendant having adopted some mark or device or label, or something of that kind, which distinguishes the plaintiff's from other goods which have, like his, the features common to the trade. Unless the plaintiff can bring his case up to that, he fails.' Payton v. Snelling, 17 R. P. C., 48, 52. 'The evidence is very strong that one tin may be mistaken for the other, very likely; but why? Because of the features common to them and

common to all.' Payton v. Snelling, 17 R. P. C., 628. 'The only question you have then to consider is whether the defendant's get-up is so like the plaintiff's as to be calculated to be mistaken for it. But when, as in this case, and in the last, what is called the plaintiff's get-up consists of two totally different things combined, namely, a get-up common to the trade, and a distinctive feature affixed or added to the common features, then what you have to consider is not whether the defendant's get-up is like the plaintiffs' as regards the common features, but whether that which specially distinguishes the plaintiffs' has been taken by the defendants.'" (Payton v. Ward, 17 R. P. C., 58.

* * *

Proctor & Gamble Co. v. Globe Refining Co., 92 Fed., 358, Circuit Court, Sixth Circuit, before Justices Taft, Lurton and Severens, opinion by Justice Severens.

The court thus describes the packages involved in this suit:

"The packages in which the respective parties put up their soap for the market are simlar in form and size, being about 4 inches long, 2¾ inches wide, and 1½ inches thick. The label of the complainant, printed upon the wrapper on the upper flat surface of the cakes, consisted in large part of the words 'Every Day Soap'; the first two words being in large, fancy letters, in a curved line, in the upper part of a rectangular space about the size of the cake, and the word 'Soap,' also in large, fancy letters, under the former words. In the lower left-hand corner is a circular figure, about three-fourths of an inch in diameter, in the resemblance of a full moon, bearing a human face within it, looking to the left; the rest of the contents of the circle being a black field, with 13 white stars thereon. At the right of this, and extending across three-quarters of the length of the label, are the words 'Proctor & Gamble,' and under

these the word 'Cincinnati,' all in good-sized letters. There is some additional matter of ornamentation. All the foregoing characters were stamped or printed upon the face of light yellow paper. Upon one edge of the cake, or, rather, upon the wrapper, where it covers the side of the cake, there were printed the words 'Manufactured at Ivorydale,' 'Factories conducted on the profit-sharing plan,' in two lines, on a rectangular space about three inches long and half an inch wide, of the same light yellow color. The rest of the complainant's wrapper is of a darker color, filled with an obscure, uniform ornamentation. The first of the defendant's labels (being the one the use of which was enjoined) was of the same color as the complainant's, and bore upon its face, in letters, the words 'Everybody's Soap'; the letters being in about the same style as the complainant's, and formed in a very similar manner. There was a circular figure of the same size in the lower left-hand corner, but filled with different characters. At the right-hand of this, where the complainant printed the words 'Proctor & Gamble,' the defendant printed the words 'Globe Refining Co.' Underneath this was 'Louisville, Ky.,' instead of 'Cincinnati' in the complainant's label. On the wrapper along both edges of the cake was printed other matter, having no resemblance to that of the complainant's. This wrapper had been in use for a few weeks only when the original bill was filed, and was thereupon discontinued. The defendant had been previously engaged for a much longer time in the manufacture and sale of the same or similar soap. The defendant's second label (the one now in question) was adopted, as the defendant claims, to obviate the objections which had been made to the use of the first. *The wrapper was of the same color as before.* The label on the upper surface of the cake was black, except where lettered. It bore the words 'Everybody's Soap,' the word 'Everybody's' being in script; the letter 'E' being a capital, and the rest in ordinary style, though all were of good size, and

plainly readable at some distance. The word 'Soap' was in plain type, in smaller letters, and both were arranged in a similar relation to each other and to the surface of the label as the words 'Every Day' and 'Soap' in the complainant's label, except that the word 'Everybody's' was straight, instead of circular, running from near the lower left-hand to the upper right-hand corners, and the word 'Soap' filled the space in the lower right-hand corner. The color of the letters was light yellow, and the letters appear to consist of the wrapper itself showing through the black field of the label surrounding them. There was no circle in the lower left-hand corner, as in the complainant's label and the first of the defendant's, and there was no name of the manufacturers and their place of business, as in those. There was scarcely any ornamentation, the whole being of plain style. On one side of the cake upon the wrapper was printed in black letteres the words 'Everybody's Soap,' 'Made by,' 'Globe Refining Co., Louisville, Ky.,' in three lines; and on the other, 'Everybody's Soap,' 'Best, goes farthest,' in two lines. The rest of the wrapper was filled with pictures of a cavalcade, illustrating how all classes and peoples glorify 'Everybody's Soap.' "

* * *

"The complainant alleges, among other things, that it has for many years put up its soap in the form, size and color of package in which it now does, and that from these peculiarities and its label the public have thereby become familiar with its goods; and it is further charged that the defendant imitates its package, in the form and size of it, as well as the color of the wrapper. But, if it were conceded that the complainant could acquire an exclusive privilege to the use of such characteristics, it is not shown that their practice in respect to either the form or size of the cake or the color of the wrapper was peculiar to themselves, and *non constat* that other manufacturers, including the defendant, were accustomed to put their goods in the same style in respect to

these peculiarities. This part of the case stands on the same footing as did the black and gold labels on the ends of the spools whereon the plaintiff's trade mark was printed in the case of Coats v. Thread Co., *supra;* such labels having become common property. Aside from these features, there are not many points of similarity. The principal one is the use in both labels of the word 'Every' in the complainant's, and as a component part of the word 'Everybody's' in the defendant's, upon the wrapper on the upper surface of the cake, which is the only place where it occurs on the complainant's package. But in this context it should be noted that all the letters on this surface of the package are printed in black, upon a light yellow ground, while on the defendant's the letters are light yellow on a black ground. In the complainant's the letters are in the similitude of type-written letters ornamented, while the defendants are in script. On the defendant's label the figure of the moon and the characters exhibited therein by the complainant's is not shown and the name of the manufacturer, which, on the complainant's label, is quite plainly shown, is not printed on the defendant's. The print and characters displayed on the sides and back of the defendant's wrapper bear no resemblance to anything on the complainant's. On one side of the complainant's the place of manufacture is stated to be Ivorydale. On the defendant's it is stated as at Louisville, Ky., and the name of the manufacturer, 'Globe Refining Co.,' is distinctly shown. *Thus, on each wrapper, the name of the respective manufacturers is conspicuously shown, and this is one of the important means of identification.* P. Lorillard Co. v. Peper, 30 C. C. A., 496, 86 Fed., 956, 959. By the sight of the package, or by hearing the distinctive appellation read, customers would, in general, if not universally, identify the goods they were buying. It is hardly conceivable that anyone familiar with the appearance of the complainant's package, who looked to the article he was purchasing to see whether it was the

same, could fail to notice the difference, on the defendant's package being offered to him. The retail dealer would, beyond doubt, know the difference. Both seller and buyer would know that manufacturers generally put up their goods in the same shape and style, and the slightest inspection of the other characteristics would indicate the difference. If the consumer called for 'Every Day' soap, and the retailer supplied him with 'Everybody's' soap, it would be a fraud for which the defendant would not be liable, as was pertinently said by Mr. Justice Brown in Coats v. Thread Co., already cited. And in passing, we observe that what is mainly relied on in the present case as the imitation so injurious to the complainant, namely, the use of the word 'Every' is not more likely to produce confusion with purchasers than where the use of the words 'Best Six Cord' on the black and gold labels of the parties in the case just referred to, where an injunction was denied. But it is said that the evidence shows that the defendant's officers studied how closely they might approximate the complainant's label without exposing themselves to suit, and that this indicates a purpose to purloin the complainant's good will. The evidence does show that such consultations took place in reference to the first label, but it is also shown that on discontinuing that they took legal advice in regard to the making of a new one. If they were intending to devise a new label which might attract purchasers by an alluring advertisement, they might lawfully do this, if they made it in such a form and style as would not lead purchasers to think they were buying the complainant's goods. The evidence does not clearly show that there was bad faith in devising the new label. It is not inconsistent with an honest purpose."

The judgment of the trial court in refusing an injunction was affirmed.

Philadelphia Novelty Mfg. Co. v. Rouss, 40 Fed., 586, Circuit Court, Southern District of New York, opinion by Justice Coxe.

This is a suit in which the complainant charges defendant with infringing its right in the use of wrappers and labels used in putting up hair pins:

> "The contention is therefore narrowed down to the question whether any right of the complainant is violated because the defendant sells crimpers wrapped in tan-colored paper, and packed in red boxes. It is thought that the affirmative of this proposition cannot be maintained, and especially so in the absence of proof that purchasers have been deceived. There is, of course, a general similarity between all crimpers of this pattern; but no one who thoroughly understood the distinguishing features of the complainant's crimpers, and preferred them to the defendant's, could ever mistake the latter for the former. In addition to the differences of the labels, before adverted to, the complainant's crimpers are smaller than the defendant's, and much heavier—a box of them weighing over three times as much. The wrappers, too, are unlike. The defendant's wrapper is about two and one-fourth inches in length, and contains nothing but the printed words of the 'Lanktry' white label. The complainant's, on the contrary, is nearly four inches in length, and in addition to the words of the 'Madam Louisa' white label, there appears the complainant's vignettes, directions for use, and a caution against 'Spurious imitations.' In short, there are marked differences in everything except in the color of the boxes and wrappers, and these differences are so pronounced and unmistakable as to overshadow the two points of similarity. The language of Mr. Justice Field, in Tobacco Co. v. Finzer, 128 U. S., 182, 9 Sup. Ct. Rep., 60, seems applicable:
>
> " 'The judgment of the eye upon the two is more satisfactory than evidence from any other source

as to the possibility of parties being misled so as to take one tobacco for the other; and this judgment is against any such possibility. Seeing, in such case, is believing; existing differences being at once perceived, and remaining on the mind of the observer. There is no evidence that anyone was ever misled by the alleged resemblance between the two designs.'

"There is no such evidence here. The proof is overwhelmingly to the effect that a purchaser really preferring the 'Madam Louisa' crimpers, and desirous of procuring them, could not be deceived by the defendant's crimpers, unless she were afflicted with partial blindness, an arrested mental development, or an unusually heedless disposition. The law cannot take cognizance of conditions so abnormal. In Adams v. Heisel, 31 Fed. Rep., 279, the court, in dealing with facts quite similar to those in hand, observes:

" 'The complainants could not obtain a trade mark for the form of the sticks of chewing gum they might manufacture, nor by the use of a peculiar form and decoration of the boxes they may use to hold the sticks of gum, nor in the manner in which the gum might be placed in the boxes. These qualities and forms are common to the manufacture, and may be made similar without injury to others who may use the same forms. * * * The complainant cannot now so broaden and enlarge their trade mark as to cover the whole box, with all its ornaments and forms of putting up the gum, and the colors used in such decorations, and thereby prevent others from using these forms of putting up gum for sale.'

"*The trend of the law is strongly towards the proposition that in ordinary circumstances the adoption of packages of peculiar form and color alone, unaccompanied by any distinguishing symbol, letter, sign, or seal, is not sufficient to constitute a trade mark.* Fleishman v. Starkey, 25 Fed. Rep., 127; Fairbanks v. Jacobus, 14 Blatchf., 337; Sewing Machine Co. v. Gibbens Frame, 17 Fed. Rep., 623; Moorman v. Hoge, 2 Sawy., 78; Faber v. Faber, 49 Barb.,

358; Davis v. Davis, 27 Fed. Rep., 490; Falkinburg v. Lucy, 35 Cal., 52; Chemical Co. v. Stearns, 37 Fed. Rep., 360; Browne, Trade Marks, pars. 271-272. The courts will have time for little else if they undertake to meddle with and regulate the color and size of the wrapping paper and boxes in which a shopkeeper displays his wares. Trade should not be hampered by vexatious restrictions in matters apparently so trivial."

Fleishmann et al. v. Starkey, 23 Fed., 127, Circuit Court, District of Rhode Island, opinion by Justive Colt:

"The complainants are the owners of certain trade marks used upon their packages of compressed yeast, and they charge the defendant with an unlawful imitation of the same. It is clear, on a comparison of the labels, that the *defendant is not guilty* of any infringement *unless the use of a yellow-colored label makes him chargeable.* The position taken by the complainants that the essential part of their trade mark consists of a label having a yellow color, and that, therefore, they cover all yellow-colored labels used upon compressed yeast, and that the use by the defendant of a yellow-colored label upon the compressed yeast made and sold by him constitutes an unlawful imitation of their trade marks. The defendant has taken no testimony. The evidence of the complainants goes to prove that yeast with a yellow label sells readily, while yeast with a white label or any color other than yellow sells with difficulty—the cause of this being the reputation acquired in the market of the article manufactured by the complainants; and, further, that the public are deceived into buying other and inferior yeast having a yellow label as the genuine yeast made by them. *This case narrows itself down to the question whether a label of a single color, like the one in controversy, is the lawful subject of a trade mark apart from any name, figure, or device with which it may be connected, so that a person who adopts a similar color upon his*

label may be charged with an unlawful imitation. Color often serves as the groundwork of a trade mark, and it may be a very essential element in its composition. In determining the question of infringement, it is often a very important circumstance. Browne, Trade Marks, pars. 263, 265, 267. But the term 'Mark' implies form rather than color, and it consists of some peculiar name, symbol, figure, letter or device whereby one manufacturer distinguishes his goods from like goods sold by other persons. Falkinburg v. Lucy, 35 Cal., 52. *The color of a label, apart from a name or device, can hardly be the subject-matter of a trade mark. The effect would be that a single manufacturer might acquire the exclusive right to the use of labels of a certain color, or to the colored paper in which his goods might be wrapped.* This might seriously interfere with trade and with legitimate competition. Browne, Trade Marks, pars. 271-272. Whatever view may be taken by the French courts in the cases referred to by the learned counsel for complainants, we know of no American or English authority which goes to this extent. On the contrary, so far as the point has been touched upon in the adjudicated cases which have come to our notice, an opposite conclusion seems to have been reached. Falkinburg v. Lucy, *supra;* Faber v. Faber, 49 Barb., 357.

"It follows that the defendant, in using a label of a yellow color, is not guilty of any infringement of complainants' trade marks, and that the bill should be dismissed."

Brown et al. v. Seidel et al., 153 Pa. St., 60:

"The respective parties are engaged in the manufacture and sale of an article of stove polish, and there certainly is a resemblance in the size of the packages, and in the manner in which they are put up, between those of the defendants and the plaintiffs. They both use tinfoil as wrappers for the stove polish, over which is placed a paper wrapper of similar colors. The packages as thus put up might per-

haps induce an ignorant or a careless person to mistake the one for the other, provided he made no examination whatever. *The mere possibility of a mistake, however, is not sufficient.* As was said in Heinze v. Lutz, 146 Pa., 592: *'It is not enough that there may be a possibility of deception. The offending label must be such that it is likely to deceive persons of ordinary intelligence.'* See authorities there cited."

Heinze et al., v. Lutz et al., 23 Atl., 314, Supreme Court of Pennsylvania:

This is a suit in which one fruit dealer sought to enjoin another from using a fruit label which resembled his own in color and arrangement of the fruit. There was no similarity in those parts which might be claimed as a trade mark. One was called "Keystone Brand," and the other "Diamond Brand." The name of each dealer appeared on his label in large letters of different colors. In reversing the award on an injunction by the trial court, the court said:

"It is not enough that there may be a possibility of deception. The offending label must be such that it is likely to deceive persons of ordinary intelligence. It is not necessary to show that persons have been deceived, yet the finding of the Master that no one has been deceived, although defendant's label has been in use for some time in the same vicinity as that of the plaintiffs, is certainly strong evidence in support of defendant's allegation that their label is not likely to deceive. Dixon v. Guggenheim, 7 Phila., 408, decided by the writer when sitting in the common pleas of Philadelphia, has been so generally accepted as law that I may be excused for giving a brief extract from the opinion in that case:

" 'That a similarity between two trade marks used by different manufacturers for their goods although of such character as to induce a belief in the mind of

the public that they belong to and designate the goods of the same manufacturer or trader, is not of itself sufficient ground for the prohibition of the use of such trade mark by him who did not first adopt it. That similarity, to entitle the originator to the protection of the law, must be such as to amount to a false representation, not alone that the two articles have the same origin, but that the goods to which the simulated mark is attached are the manufacture of him who first appropriated the trade mark.' "

Ball v. Siegel, 4 N. E., 668, Supreme Court of Illinois:

In refusing to enjoin the use by one corset manufacturer of a box in which his corsets were sold charged to be similar to that of the plaintiff, the court said:

"It is true that, in cases of this kind, as a general rule, exact similitude is not required to constitute an infringement, or to entitle the complaining party to protection; but if the form, marks, contents, words, or their special arrangement, or general appearance of the words, of the alleged infringer's device are such as would be likely to mislead persons in the ordinary course of purchasing the goods, and induce them to suppose that they were purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection if he takes seasonable measures to assert his rights and prevent their continued invasion. Thompson's note to Popham v. Cole, 23 Amer. Rep., 28. But the court is not bound to interfere where ordinary attention will enable purchasers to discriminate between the trade marks used by different parties."

Enoch Morgan Sons Co. v. Troxell et al., 89 N. Y., 292:

"The only points of similarity between the two articles sold are that they are both small cakes of soap, covered with tinfoil or tinned paper, and having a blue band around them, with gilt lettering. The cakes are not even of the same shape, one being near-

ly square, and the other an oblong. But we are of opinion that this form of package, with a blue band and gilt lettering, could not be appropriated by the plaintiff as a trade mark. There is nothing peculiar about it, and it is an appropriate and usual form in which to put up small cakes of soap, and the law of trade marks has not yet gone so far as to enable a party to appropriate such a form of package and fashion of label, and exclude everyone else from its use, or from the use of anything resembling it. If it had, the different forms and fashions of cigar boxes, packages of chewing tobacco, perfumery, canned goods, and other small articles, and the color or style of labels which every dealer, according to his taste, adopts or selects from those in use, would afford food for litigation sufficient to give constant occupation to the courts.

"All these articles of each class bear a general resemblance to each other, and the products of the different dealers can be distinguished only by the brands, marks or names which they may put upon them, and these can be protected as trade marks only so far as they are new and comply with the other conditions necessary to constitute a trade mark.

"When there is a simulation of a trade mark, and the intent becomes a subject of inquiry, the form, color and general appearance of the packages may be material, but to sustain an action there must be an imitation of something that can legally be appropriated as a trade mark. When we come to look at the brands or contents of the labels they are entirely different. The label of the plaintiff, on one side of the package, is 'Sapolio for cleaning and polishing, manufactured by Enoch Morgan's Sons & Co., 440 West Street, New York,' and on the other side 'Enoch Morgan's Sons' Sapolio,' with a well-drawn figure of a human face opposite a pan, and reflected in it."

* * *

"If, as we think, there was no imitation of any trade mark of the plaintiff, the judgment cannot be

sustained on the ground of fraudulent representations, or devices on the part of the defendants to palm off their goods upon individuals as the goods of the plaintiff. What remedy there is for such a wrong if proved it is not necessary now to inquire, but the remedy clearly is not to restrain the defendants from selling their own goods in packages, and with labels which they have a legal right to use, and which do not infringe upon any trade mark of the plaintiff.

"The judgment should be reversed, and a new trial ordered, costs to abide the event."

Mr. High, in his work on Injunctions, says, paragraph 1076:

"There can be no trade mark in the exterior color or form of the articles, and hence no injunction to protect the plaintiff in the manufacture of the article of the peculiar form or color. So, a package or barrel cannot by reason of its peculiar form. dimensions or shape, independent of any symbol, figure or device impressed upon or connected with it, constitute a trade mark, and will not be protected by injunction."

Nims, in his work on Unfair Business Competition, says:

"Generally speaking, a trader cannot be entitled even after long and exclusive use, to monopolize a particular color or a particular shape, size or style."

In Mumm v. Kirk, 40 Fed., 589, complainant's champaigne was known as "Mumm's Extra Dry," and the bottle had a capsule of a peculiar color. Defendant used a capsule of similar color, and described his wine as "Extra dry." His labels were entirely different, but the labels often dropped off in cooling, before the bottle reached

the consumer. There were minor differences in dress in addition to the difference in labels. Defendant was not required to change the color of his label.

Conclusion.

While the Houston Ice & Brewing Association cannot boast of being "the largest institution of its kind in the world," it can justly claim that, among the industries of its kind it stands, with respect to volume of business and excellence of its product, second to none in the State of Texas. It is not an unknown institution, or one without a reputation for honesty and fair dealing. The history of the growth of its business attests this. This history is set forth in the record.

Beginning in 1893 with gross sales slightly in excess of $200,000.00, its record (Tr., 142, 143) shows an increase each year over the preceding year, without exception, scarcely, until in 1914, when the gross sales for that year amounted to but little less than two millions of dollars.

Beginning in 1893 with a total output (Tr., 141) of 25,738 barrels, the history of its brewery shows an increase, year by year, and each year, until in 1914 its output amounted to 178,000 barrels, equal to the output of its first year multiplied seven times over, and equal to over *fifty-three million bottles of beer.*

Its brewery, in the ten years next preceding the year in which the case was tried, actually bottled and sold over sixty-two million bottles of beer (Tr., 142, 143), and this in addition to a larger quantity of keg beer. In six years of this period, constituting the past portion of it, the "largest institution of its kind in the world" marketed in Texas twelve million bottles *less* than this.

Nor has this result been accomplished by offering a cheap substitute for the beer of its great competitors. It has not sought the cheaper trade. (Tr., 109.) On an average, it has received $9.00 a cask for its beer *delivered*, and the complainant has received on an average $9.75 a cask for its beer *delivered*. Taking into consideration the difference in distance of the respective breweries, from the market to which this beer was sold, it is perfectly plain that during this period the *Houston Ice & Brewing Association has received more for its beer than the complainant has for its.*

The Houston Ice & Brewing Association has a good will of its own. It is not seeking to build itself up on someone else's reputation. Ever since 1893, and up to the time prohibition became effective in Texas, it has been manufacturing a beer under one name. The bottles of this beer that have been sent out by it broadcast over the market in which it deals, run up into millions. During this time it has constantly sought to manufacture a beer as good as any. (Tr., 109.) With such a history it could not have failed to make a reputation for itself. It is vitally concerned in protecting this reputation.

It is not, and has not been, necessary for it to "steal" the trade of any rival or competitor. It is not, and has not been, necessary to commit fraud to market its goods. "Did you or any of the officers of the company," Mr. Autrey, the manager of the brewery, was asked, "know that Mr. Harlan or anyone else in the employ of the company were, if it was a fact, representing that the beer manufactured by the respondent could be sold unbeknown to persons for Schlitz beer?" His answer: "Positively, no; I would not countenance such conduct of that kind on the part of our representatives."

Nor is there any such evidence. The trial judge saw the witness that gave this testimony, and was in a position to say whether the answer was true or untrue. If the representatives of the Houston Ice & Brewing Association were sent out to advocate the sale of its product because *it could be fraudulently sold for Schlitz beer*, Mr. Autrey knew it. If he didn't know it, it did not occur.

Petitioner had the names of these representatives. It could have produced them as witnesses, but none were called. With the agencies and instrumentalities which the petitioner on the trial showed that it possessed for scouring the country in search of testimony, it is fair to presume that these men were found, and that their statements would not support the charge made.

The manner in which respondent's new label was chosen has been stated. With a situation approaching where the dark bottle, because of the advantages attributed to it, would constitute over 85 per cent. of the containers of its beer, the Houston Ice & Brewing Association, for the obvious reason that the white label could not be used, sought a new label, and in doing so selected a color which it thought made a presentable appearance. This may have been because, independently, the color does harmonize with the bottle; or it may have been it merely thought it did. Upon this label it put its name in unmistakable terms. For the size and shape of the label it chose something new and different from anything that was being used. Every essential feature of the label pointed to it as the manufacturer. For the neck label it chose something equally distinctive. With this new label it set out to further increase the volume of its business and increase its good will.

When complaint of this label was made, it readily

agreed to remove the one feature of the label to which it thought exception could be made; and did remove it. But this did not satisfy complainant. The *color* of the label still remained; and petitioner would not be satisfied if the color remained the same, no matter what the other features of the label were.

The desire of petitioner to have a label which will indicate its beer to the Cuban and Mexican, to the Hindu and the Cossack, the Jap and the Chinee, the literate and the illiterate. The world-wide trade which it claims to enjoy distinguishes the instant case, it says in its brief, from any which have been decided by the court. This desire is a natural one. We hope it may be gratified; but it cannot be gratified if nothing will suffice but that all other beer dealers shall abstain from the use of a brown label of any sort on a brown bottle. This would be conferring a monopoly which the courts have said should not be done.

If petitioner set out with such a desire, when it sought a new label in 1914, and if the present one will not accomplish it unless all other brown labels on brown bottles of beer are for all time forbidden, the mistake that is made is apparent. It should have chosen a more striking and distinctive mark or sign for its label. The brown color was proper, but it should have taken something in connection with such label of an original character that was of *striking appearance* and that would have been known at a glance. The red diagonal band of Anheuser Busch is illustrative. This has a meaning. If petitioner's protection under the label adopted depended upon the exclusive right to use the color brown selected, it *knew* that it could not have a monopoly of this color. *There* was its mistake, if mistake there was.

We do not believe there was a mistake. We believe, in the language of Judge Sanborn (97 Fed., 785) that if one seeks a beer "made by one manufacturer rather than that prepared by another, it is his duty to examine the wrapper with such a degree of care as would ordinarily ascertain who the manufacturer of the article which he puchases is."

We respectfully ask that the judgment be affirmed.

H. M. Gamrod

Jesse Andrews

Walter H. Walne

Solicitors for Respondents.

Baker, Botts, Parker & Gamrod

Of Counsel.

JOSEPH SCHLITZ BREWING COMPANY *v.* HOUSTON ICE & BREWING COMPANY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 326. Submitted April 24, 1919.—Decided May 19, 1919.

A manufacturer of beer cannot claim the exclusive right to use brown bottles with brown labels; but their adoption by a competitor may contribute to a wrongful deception if combined with an imitative inscription.

Held, that defendant's label was so dissimilar to plaintiff's in shape, script, meaning, and mode of attachment, that it could not be said to add appreciably to any deception that might arise from the brown color of label and bottle.

241 Fed. Rep. 817, affirmed.

THE case is stated in the opinion.

Mr. Russell Jackson for petitioner. *Mr. John W. McMillan* was on the brief.

Mr. H. M. Garwood for respondents. *Mr. Jesse Andrews* and *Mr. Walter H. Walne* were on the brief.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought to restrain the use of a trade-mark alleged to infringe the plaintiff's or at least to be used in a way that is calculated to deceive and unfairly to interfere with the plaintiff's good will. Both Courts have found for the defendant, 241 Fed. Rep. 817, 154 C. C. A. 519, so that the only question that we shall consider is whether upon inspection it can be said as matter of law that the admitted acts of the defendant are a wrong of which the plaintiff can complain.

Both parties sell beer in brown bottles with brown labels and the plaintiff conceded below and still with some unwillingness seems to concede that, although perhaps it first introduced them in this connection and this place, it cannot claim the brown bottle, the brown label, or the two combined. These could be used without a warning, such as sometimes is required, that the beer was not the plaintiff's. The only question is how the additional element, the form of the inscription, should be treated. It often is said that the plaintiff must show a deception arising from some feature of its own not common to the public. *United States Tobacco Co.* v. *McGreenery*, 144 Fed. Rep. 531, 532, cited by the Court below. But so stated the proposition may be misleading. It is not necessary that the imitation of the plaintiff's feature taken alone should be sufficient to deceive. It is a fallacy to break the fagot stick by stick. It would be enough if taken with the elements common to the public the inscription accomplished a result that neither would alone. *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Massachusetts, 154, 156.

But it is true that the unlawful imitation must be what achieves the deception, even though it could do so only on the special background lawfully used. The question again narrowed is whether that is the case here. The

shape of the defendant's label is different from the plaintiff's; the script upon it not only is wholly different from the other in meaning, to one who reads the two, but hardly can be said to resemble it as a picture. The two labels are attached to the bottles in quite unlike modes. The Schlitz is applied in a spiral around the length of the bottle so as to make the ends of the label parallel to the sides of the glass. The defendant's is pasted around the bottom of the bottle in the usual way. This diversity of itself renders mistake unlikely. If there were deception it seems to us that it would arise from beer and brown color and that it could not be said that the configuration appreciably helped. *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, 573. Beyond stating the principles to be applied there is little to be said except to compare the impression made by the two, or, if that form of statement is preferred, the memory of Schlitz with the presence of the defendant's bottles as marked.

Decree affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent.